(22,212)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 69.

EDWIN HOWARD AND EMMA HOWARD, HIS WIFE, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA AND CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1912.

a 8381.

Filed Sep. 29, 1909.

C. S. REINHART, *Clerk*.

Entered.
App. Doc. No. —.
Page —.

b In the Superior Court of the State of Washington in and for the County of Pierce.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., Defendants.

Transcript to the Supreme Court.

No. 27364.

Index.

1 In the Superior Court of the State of Washington in and for Pierce County.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY, Defendants.

Amended Complaint.

Comes now the plaintiffs and for their cause of action against the above named defendants, allege as follows:

I.

That the city of Tacoma is a municipal corporation of the first class under the laws of the state of Washington.

II.

That during all the times herein mentioned, the defendant Chicago, Milwaukee & St. Paul Railway Company, was and is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, and that it has duly complied with all the provisions of the laws of the said state in respect to railway coporations that it is authorized by its articles of incorporation to locate, build and equip, run and operate a steam railway for the carriage of freight and passengers, extending from convenient points within the cities of Tacoma and Seattle, in said state, in an easterly or southeasterly direction to the eastern boundary line of said
2 state; that it is authorized to acquire land, rights and easements in said state, by purchase or by the exercise of the right of eminent domain, for the use and purposes of the railroad aforesaid; that said defendant had theretofore definitely located and adopted the route of its railway, through the county of Pierce and through Indian Addition hereinafter mentioned, and in the city of Tacoma, and has heretofore acquired land in said city and county and said Indian Addition for right of way, depot and terminal grounds to be used in the transaction of its business as a common carrier; that prior to the first day of June, 1906, it was the owner in fee simple of all of blocks 7538, 7540 and 7542, of what was then known as Indian Addition, in the county of Pierce, state of Washington, said Indian Addition being unincorporated territory; that said Indian Addition at said time, and all the times prior to the 19th day of August, 1907, was a part of the county of Pierce in the state of Washington, and was not lawfully a part of any city or said city of Tacoma, Washington, for any purpose whatsoever; that at said time, in said Indian Addition, there was lawfully laid out, dedicated and established and existed, certain highways and streets, among others, "M" and "N" streets and 25th and 26th streets, said "M" and "N" streets running parallel with each other and 25th and 26th streets running parallel with each other but in the opposite direction to said "M" and "N" streets and intersecting said "M" and "N" streets at said blocks 7538, 7540 and 7542.

That said defendant as owner in fee of all of said blocks 7538, 7540 and 7542 did on the — day of June, 1906, petition the board of county commissioners of the county of Pierce, for the vacation of all those portions of "M" and "N" streets in said Indian Ad-
3 dition lying between blocks 7538, 7540 and 7542 aforesaid, and plaintiff attaches hereto a copy of its said petition for vacation, marked Exhibit "A" and made a part of this complaint.

III.

That said railway at said time proposed and since has constructed its road along a line over and across said "M" and "N" streets be-

tween 25th and 26th streets at right angles to said "M" and "N" streets; that the purpose and object of securing the vacation of said "M" and "N" streets by defendant railway company as aforesaid, was to avoid street crossings on said "M" and "N" streets, and thus enable said railway company to operate its road when constructed, more advantageously with less expense, and less danger to life and property, and also to secure the ground of said street which it proposed to use and which it has since taken possession of as a railroad right of way; that the vacation sought and requested by said petitioner in his petition was for its sole use and benefit; that at the time of filing said petition, 25th street was a graded street and "M" and "N" streets were graded streets and were then used as a highway or roadway by the public generally and by these plaintiffs. That on the hearing of said petition it was agreed by and between the said county commissioners and the said railway company, that it would vacate said portion of said "M" and "N" streets petitioned for on the conditions named in Exhibit "B" hereinafter referred to; that in pursuance of said petition and said agreement just mentioned, the said board of county commissioners duly authorized by law, acted upon the same and made an order or writing, a copy of which order or writing is hereto annexed and marked Exhibit "B" and by such reference is made a part of this complaint; that nothing fur-
4 ther was done by the said board of county commissioners in reference thereto, other than the making of the order or writing above mentioned, that said board of county commissioners never made any order for the construction of any road on South 26th street or plank sidewalk on the side thereof; that said board of county commissioners never furnished to defendant company any plans either proposed by it or approved by it for the construction of said roadway on 26th street; neither did the county surveyor ever furnish the defendant railway company any plans or specifications for the improvement of a roadway on said 26th street; that subsequent thereto and on or about the 19th day of August, 1907, in pursuance of chapter 245 of the laws of 1907, of Washington, said Indian Addition was voted in and duly annexed to the city of Tacoma, by proper ordinance and for the first time belonged to the city as a part thereof; that on said 19th day of August, the said city of Tacoma, a municipal corporation, acquired full jurisdiction and authority over all the streets and alleys in said Indian Addition including 26th street and "M" and "N" streets and took possession of said streets for and on behalf of the public.

IV.

That on or about the — day of May, 1908, the defendant the Chicago, Milwaukee & St. Paul Railway Company, without any order or direction from the board of county commissioners of Pierce county, or the city of Tacoma, commenced to change the surface of said South 26 street between east "L" street and east "P" street in said Indian Addition by making excavations and fills therein, and thereupon notified the city of Tacoma, through its commissioner of pub-

lic works and city engineer of its intent to grade said streets
5 and change the surface thereof under the purported authority of law and order of the board of county commissioners of Pierce county, heretofore referred to, and thereupon the commissioner of public works of the city of Tacoma, the city engineer and the members of the city council of said city of Tacoma, inspected said proposed work and made and directed said changes in the proposed plan for constructing the roadway in said street, increasing the height of the fills and the depth of the cut proposed to be constructed by said railway company and directed that said work be done under the direction of the commissioner of public works and city engineer of said city.

V.

That thereupon and in pursuance to the verbal orders and directions of the commissioner of public works and city engineer of said city of Tacoma, and with the knowledge consent and acquiescence of the city council of the said city of Tacoma, and the mayor of said city, the defendant, the Chicago, Milwaukee & St. Paul Railway Company, changed the natural surface and grade of said South 26th street from east "L" street to east "P" street, by constructing a roadway thirty feet in width and in many places, making cuts thirty feet wide and from five to twenty feet deep and in other places making and constructing fills thirty feet wide and from five to ten feet high.

VI.

Plaintiffs allege that no ordinance was ever passed by the city council of the city of Tacoma, establishing a grade on said South 26th street from east "L" street to east "P" street and that said street was not improved and said roadway not constructed in con-
6 formity with any grade established on said street by ordinance of the city of Tacoma, and the city council of the city of Tacoma, did not authorize the grading of said street and the changing of the natural surface thereof by the said railway company by any ordinance or resolution passed by said city council, but all of said work and improvement was done by the said railway company under the unlawful and wrongful oral direction of the commissioner of public works, city engineer and city council of said city of Tacoma, but that said improvement and grading was done by said railway company under a pretense of complying with the provisions of the order of the board of county commissioners of Pierce county hereinbefore set forth, for the purpose of obtaining possession of the portions of "M" and "N" streets sought to be vacated by said board of county commissioners.

VII.

That after said work was completed, the said city of Tacoma, without the passage of any ordinance or resolution, adopted and approved of the work so done by said railway company by accepting the benefits thereof and using said east 26th street as a public street and exercised supervision over said street and used said street for its

own purposes and permits the public at large to use the same as a thoroughfare. That said city of Tacoma, has treated the said part of said "M" and "N" streets above mentioned and now occupied by defendant railway company as vacated and has permitted the railway company to take possession of it and use it as its own property in consideration of said railway company having constructed and built said roadway on South 26th street between east "L" and east "P" streets as aforesaid and as soon as the said railway company has constructed said roadway on 26th street and in considera-
7 tion of its having so constructed said roadway, defendant city surrendered such part of "M" and "N" streets aforesaid to said railway company. That said portions of said "M" and "N" streets are now closed and the public at large are not permitted to use the same. All of which was done without lawful authority in the premises and to the great injury of these plaintiffs. That the plaintiffs are the owners of the lots hereinafter described and said lots at all times herein mentioned faced upon South 26th street between east "L" and East "P" streets and were prior to the construction of said roadway on a level with said South 26th street and the owners and tenants had easy and convenient ingress and egress to and from said lots and street.

VIII.

That South 26th street is sixty feet wide, and the roadway as constructed, thirty feet wide, is in the center of said street; that said property of these plaintiffs hereinbefore mentioned and owned by these plaintiffs is lots 5 & six (6) in block 7637, Tacoma Land Company's Seventh Addition to Tacoma; that said lot is twenty-five by one hundred and twenty feet; that during all the times herein mentioned, plaintiffs had upon said lot a dwelling house occupied by plaintiffs; that the defendant company in constructing said roadway, made a cut in front of the premises of these plaintiffs thirty feet wide and eighteen feet deep, thereby causing an obstruction to plaintiffs' ingress and egress to and from said lot and entirely depriving plaintiffs of the use of said street or access thereto from their property, and leaving the residence of said plaintiffs on a high embank-
ment above the roadway so constructed on said street, without
8 any means whatever of obtaining access to said roadway from said premises rendering said property unsightly and undesirable and greatly depreciating the value thereof; that by reason of the construction of the roadway by these defendants, plaintiffs have been damaged in the sum of three thousand dollars ($3000.00);

Wherefore, plaintiffs pray judgment of and from the defendants and each of them in the sum of three thousand dollars ($3000), besides the costs of this action.

BOYLE, WARBURTON, QUICK & BROCKWAY,
Attorneys for Plaintiffs.

STATE OF WASHINGTON,
County of Pierce, ss:

Stanton Warburton, being first duly sworn on his oath, deposes and says, that he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and believes the same to be true; that the reason that affiant makes this verification, is the fact that all the facts and material allegations of the complaint are within the personal knowledge of affiant.

STANTON WARBURTON.

Subscribed and sworn to before me this 7th day of November, 1908.

JOHN M. BOYLE,
Notary Public.

9 EXHIBIT "A."

To the Board of County Commissioners of Pierce County, State of Washington:

The petition of the Chicago, Milwaukee and St. Paul Railroad Company of Washington, states as follows:—

1. That it is a corporation duly organized and existing under the laws of the state of Washington, and is authorized to locate, construct, maintain and operate a steam railroad for the carriage of freight and passengers from points within the city of Tacoma, to the easterly boundary line of the state of Washington.

2. That said company has located its line of railroad through the county of Pierce, and to and within said city of Tacoma, and has acquired the greater portion of its right of way for said line of railroad in said county, and has also acquired lots, blocks and tracts of land in said city of Tacoma, and adjoining that city, to be used for right of way for main and side tracks, yard and terminal grounds, freight, houses, warehouses, and other buildings and structures required for carrying on its business as such common carrier; that its main line of railroad as located and staked out, extending from the north line of Pierce county, to the city of Tacoma, crosses the Puyallup river on lot one (1) section ten (10) township twenty (20), north, range three (3) east, W. M., and extends in a westerly direction across Indian tracts two (2) twenty (20) twenty-one (21), blocks 7548, 7646, 7645 and to and upon block 7542, all in the Indian Addition to the city of Tacoma; that said company has acquired a right of way across said Indian tracts and said blocks 7548,
10 7646 and 7645 and has also acquired all of blocks, 7542, 7540 and 7538 of said Indian Addition, and other property within the city limits of said city of Tacoma, upon which to construct, maintain and operate main and side tracks, warehouses, freight houses, and other buildings and structures to be used in the transaction of its business as a common carrier and is the owner in fee of all of said blocks 7542, 7340 and 7538; that said railway company desires the vacation of those portions of "M" and "N" streets in said Indian Addition, as shown by the plat of said addition on file

in the office of the county auditor of Pierce county, and particularly described as follows:

All that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540 produced across said "M" street;

All that portion of "N" street lying between blocks 7540 and 7542 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street, each of the portions of said streets so to be vacated being a strip one hundred thirty (130) feet in length and eighty (80) feet in width.

3. Said railway company further states that said vacation is desired for the purpose of constructing, maintaining and operating main and side tracks, yards and terminal grounds, upon, over and across the portions of said streets hereinbefore described, and for erecting and maintaining freight houses, warehouses and other buildings and structures thereon, or upon parts thereof, all
11 be used in the transaction of its business as a common carrier;

Wherefore, petitioner prays this honorable Board that all those portions of said "M" and "N" streets, hereinbefore described, be vacated in the manner provided by law; that this petition be heard and determined at the sitting or session of said board of county commissioners to be held on the 22nd day of June, A. D. 1906, at 10 o'clock A. M., or as soon thereafter as the same may be heard; and that, in the meantime, notice of the pendency of said petition, be given, as provided by law.

Dated June 1st, A. D. 1906.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON,

By H. R. WILLIAMS, *President.*

Attest:

[SEAL.] E. W. COOK, *Secretary.*

STATE OF WASHINGTON,
County of King, ss:

H. R. Williams, being first duly sworn, deposes and says that he is the president of the Chicago, Milwaukee and St. Paul Railway Company, of Washington, and makes this verification on its behalf; that he has read the foregoing petition and knows the contents thereof; and that he believes it to be true.

H. R. WILLIAMS.

Subscribed and sworn to before me this 1st day of June, A. D. 1906.

[SEAL.] F. M. BARKWILL,
Notary Public in and for the State of Washington, County of King, Residing at Seattle Therein.

12 EXHIBIT "B."

In the Matter of the Vacation of Portions of "M" and "N" Streets, Indian Addition, Pierce County, Washington.

This matter coming on for hearing on this the 13th day of October, A. D. 1906, and it appearing to the board of county commissioners by the records and papers on file herein, that a petition asking for the vacation of parts of certain streets as hereinafter described was filed by the Chicago, Milwaukee and St. Paul Railway Company, of Washington, with the said board of county commissioners, and that on the 1st day of June, 1906, notices of the filing of such petitions asking for such vacations were duly posted, all as required by law, and the time set for the hearing of said petition, to-wit: on the 22nd day of June, 1906;

That on said date said matter was heard, and at said time certain protests and objections to the vacation of said streets was made and filed, and duly considered by the board, and thereafter said matter was continued from time to time.

Now, therefore, the said board of county commissioners being fully advised in the premises,

Do hereby order, subject to the terms and conditions hereinafter set forth; that all that portion of "M" street lying between blocks 7538 and 7540 of said Indian Addition, and between the south line of South 25th street and the north line of the alley running east and west along the south side of said blocks 7538 and 7540 produced across said "M" street; and also all that portion of "N" street lying between blocks 7540 and 7542 of said Indian addition and between the south line of South 25th street and the north line of the alley

13 running east and west along the south side of said blocks 7540 and 7542, produced across said "N" street; each of said portions of said strip being a strip of land one hundred and thirty (130) feet in length and eighty (80) feet in width, all as shown on map or plat of the Indian addition to the city of Tacoma, filed for record in the office of the auditor of the county of Pierce, on the 1st day of May, 1906, be and the same are hereby vacated, and the said strips of land above described so vacated are hereby attached to the lots, blocks and parcels of land abutting on the said streets so vacated.

This order of vacation is made subject to the following terms and conditions:

I.

That the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall, before this order of vacation becomes operative, at its, or their own expense and without cost or charges to or upon the said county of Pierce, improve South 26th street between East "L" street and Bay street in Indian addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said South 26th street between said limits, and by laying and con-

structing a good and sufficient plank sidewalk on one side of said South 26th street as directed by the said board of county commissioners of Pierce county, from said east "L" street to East "P" street, in said Indian Addition.

The work and improvement shall be done upon order of the said board of county commissioners and according to plans prepared or approved by the said board of the county surveyor of said Pierce county, and to the satisfaction and approval of the said board
14 of county commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of "M" and "N" street-, and shall be done within thirty days after being notified by said board to do said work and improve said street.

II.

The said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce harmless from all such claims and damages.

III.

Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions the said vacations shall become null and void and of no force and effect.

STATE OF WASHINGTON,
County of Pierce, ss:

I, I. M. Howell, county auditor, in and for Pierce county, state of Washington, do hereby certify that the foregoing is a full, true and correct copy of an order of the board of county commissioners, dated October 13, A. D. 1906, and can be found in volume 26, p. 409, of the Commissioner's Record.

15 In witness whereof, I have hereunto set my hand and affixed my official seal this 31st day of October, A. D. 1906.

I. M. HOWELL,
County Auditor,
[SEAL.] By A. J. WEISBACH, *Deputy.*

Filed in Superior Court Nov. 17, 1908. J. F. Libby, Clerk. By McK. Deputy.

16 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD et al., Plaintiffs,
vs.
CITY OF TACOMA et al., Defendants.

Stipulation.

It is hereby stipulated by and between the above named parties that the annexed map may be considered a part of plaintiffs' complaint and that portion of the map to the east of the red line, is Indian Addition and that to the west, is Tacoma Land Company's First Addition and Tacoma Land Company's Seventh Addition; that the Tacoma Land Company's Seventh Addition was laid out and platted, together with all its streets and alleys, including South 26th street, prior to the 12th day of August, 1891, and that said Addition was regularly dedicated to the public, together with all its streets and alleys, including said South 26th street, by the Tacoma Land Company, who then owned it and that the plaintiffs' complaint may be interlined to the same effect, showing that at all the times mentioned in plaintiffs' complaint, the Tacoma Land Company's Seventh Addition was a part of and within the boundary of the city of Tacoma.

BOYLE, WARBURTON & BROCKWAY, *Attorneys for Plaintiffs.*
GEO. W. KORTE,
H. S. GRIGGS,
Attorneys for Defendants.
T. L. STILES,
Att'y for Def't City of Tacoma.

Filed in open court, Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Sweet, Dep.

(Here follows map marked p. 17.)

MAPS

TOO

LARGE

FOR

FILMING

18 In the Superior Court, Pierce County, Washington.

No. 27364.

EDWIN HOWARD et ux., Plaintiffs,
vs.
CITY OF TACOMA & CHICAGO, MILWAUKEE & ST. PAUL RY. CO., Defendants.

The plaintiffs by their attorneys, Messrs. Boyle, Warburton, Quick & Brockway, here present and consenting thereto;

It is ordered that the defendants city of Tacoma and Chicago, Milwaukee & St. Paul Railway Company, have leave to withdraw their separate answers to the plaintiffs' amended complaint herein, and to file separate demurrers to said amended complaint.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 118, at page 470, Dep't No. 3 on Mar. 23, 1909.

Filed in open court, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Sweet, Dep.

19 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Defendants.

Demurrer.

Now comes the defendant City of Tacoma, and demurs to the amended complaint of the plaintiff herein, on the ground that the same does not state facts sufficient to constitute a cause of action against this defendant.

T. L. STILES, *City Attorney.*
FRANK R. BAKER,
FRANK A. LATCHAM,
Ass't City Attorneys.

Service of within demurrer by copy, admitted this 24" day of March, 1909.

BOYLE, WARBURTON & B.,
Att'y- for Pl't'ffs.

Filed in open court Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

20 In the Superior Court, Pierce County, Wash.

No. 27364.

EDWIN HOWARD et al.
vs.
CITY OF TACOMA et al., Def'ts.

Comes now the Chicago, Milwaukee & St. Paul Railway Company, one of the defendants and demur- to the amended complaint on the ground that the said amended complaint does not state facts sufficient to constitute a cause of action against this defendant.

H. S. GRIGGS,
GEO. W. KORTE,
Attorneys for said Defendant.

Waiver of copy and service admitted this March 23, '09.

BOYLE, WARBURTON & BROCKWAY, *Att'ys for Pl't'ff-.*

Filed in open court Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

21 In the Superior Court, Pierce County, Washington.

No. 27364.

EDWIN HOWARD et al., Plaintiffs,
vs.
CITY OF TACOMA et al., Defendant-.

The above entitled cause coming on to be heard upon the separate demurrers of the defendants to the amended complaint of the plaintiff- herein, Present, Messrs. Warburton and Brockway, attorneys for plaintiffs and Messrs. Korte and Griggs, attorneys for the defendant, Chicago, Milwaukee & St. Paul Railway Company, and T. L. Stiles, Esq., City Att'y, for defendant City of Tacoma.

And the court being fully advised in the premises; Ordered that said demurrers and each of them be sustained; plaintiffs except and are allowed ten days to amend.

W. O. CHAPMAN, *Judge.*

Entered in Journal No. 118, at page 470, Dep't No. 3, on March 23, 1909.

Filed in open court, Dep't No. 3, Mar. 23, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

22 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation; CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Judgment.

The above entitled matter having heretofore come regularly on for hearing on the demurrer of the defendants, to plaintiffs' amended complaint, the said demurrer having been sustained and an exception allowed the plaintiffs, and the plaintiffs having elected to stand on their said amended complaint,

It is hereby ordered, adjudged and decreed, that said action be and the same is hereby dismissed and that the defendants herein have judgment against the said plaintiffs for their statutory costs in said action, and that an exception be allowed the plaintiffs.

Dated this 11th day of June, 1909.

W. O. CHAPMAN, *Judge.*

Entered Ex. Doc. No. 24, page 30.
Entered Jour. 118, Dep't 3, page 583, Jun- 11, 1909.
Filed in Superior Court, Jun- 11, 1909. J. F. Libby, Clerk. By McK. Deputy.

23 No. 27364.

EDWIN HOWARD et ux.
vs.
CITY OF TACOMA.

Judgment Debtor-, Edwin Howard and Emma Howard.
Judgment creditor-, City of Tacoma, a corp., & Chicago, Milwaukee & St. Paul Ry. Co., a corp.
Judgment Costs with interest at 6 per cent. per annum from date and costs. Dr. Cr.
22.

Defendants' costs—clerk's fee, $7.00.
Attorney's fee, $15.00.
Judgment entered Dep't 3, Journal 118, page 583, June 11, 1909.

T. L. STILES ET AL.,
Attorney- for Judgment Creditor-.

24 **In the Superior Court of the State of Washington in and for Pierce County.**

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,

vs.

CITY OF TACOMA, a Municipal Corporation, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Notice of Appeal.

To the above named City of Tacoma, a municipal corporation, and its attorneys, T. L. Stiles, Frank R. Baker, and Frank Latcham, and to the above named defendant, the Chicago, Milwaukee & St. Paul Railway Company, and its attorneys, H. S. Griggs and Geo. W. Korte:

You and each of you will please take notice, that the above named plaintiffs Edwin Howard and Emma Howard his wife, appeal to the supreme court of the state of Washington, from that certain judgment of the superior court of the state of Washington, in and for Pierce county, in favor of the above named defendants and against the above named plaintiffs entered in the above entitled cause on or about the 11th day of June, 1909, said judgment being a judgment of dismissal and for costs.

BOYLE, WARBURTON & BROCKWAY, *Attorneys for Plaintiffs.*

25 Ent. J. 120, page 521, June 21, 1909.
Entered Ex. Doc. No. 23, page 30.

Service of the within admitted this 17 day of June, 1909.

H. S. GRIGGS,
Att'ys for C., Mil. & St. P. Ry., etc.
T. L. STILES,
City Att'y, for City of Tacoma.

Filed in Superior Court June 21, 1909. J. F. Libby, Clerk. By McK., Deputy.

26 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,

vs.

THE CITY OF TACOMA, a Municipal Corporation; CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Appeal Bond.

Know all men by these presents, that we Edwin Howard and Emma Howard, his wife, as principals, and the United Surety Company, a corporation, authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto the above named defendants, the Chicago, Milwaukee & St. Paul Railway Company, a corporation, and the city of Tacoma, a municipal corporation, and each of them in the full sum of four hundred dollars ($400.00) lawful money of the United States of America, to be paid to the said city of Tacoma, and the Chicago, Milwaukee & St. Paul Railway Company, for which payment well and truly to be made, we bind ourselves and each of us, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21 day of June, 1909.

The condition of this obligation is such, that whereas in
27 an action pending in the superior court of the state of Washington, in and for Pierce county, entitled Edwin Howard and Emma Howard, his wife, plaintiffs, vs. The City of Tacoma, a municipal corporation, and Chicago, Milwaukee & St. Paul Railway Company, defendants, and being No. 27364, the above named Chicago, Milwaukee & St. Paul Railway Company and the city of Tacoma, secured against the said Edwin Howard and Emma Howard, his wife, a judgment of dismissal and for costs of the action, and

Whereas, the above named Edwin Howard and Emma Howard his wife, have given notice of appeal from said judgment to the supreme court of the state of Washington, and are appealing from said judgment.

Now, therefore, if the above named Edwin Howard and Emma Howard, his wife, will pay all costs and damages that may be awarded against them or either of them on the appeal or on the dismissal thereof and shall satisfy and perform such judgment appealed from in case it shall be affirmed, and shall satisfy and perform any judgment or order which the supreme court of the state of Washington, may render or make or order to be rendered or made by the superior court, then this obligation shall be void, otherwise to remain in full force and effect.

ED. HOWARD.
EMMA HOWARD.
[CORPORATE SEAL.] UNITED SURETY COMPANY,
By J. H. DAVIS.
JOHN E. HEASTY,
Its Attorney in Fact.

Ent. Bonds "K", pages 48-9 June 21, 1909.
Entered Ex. Doc. No. 24, page 30.
Filed in Superior Court, Jun- 21, 1909. J. F. Libby, Clerk, By McK., Deputy.

28 In the Superior Court of the State of Washington in and for Pierce County.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs,
vs.
CITY OF TACOMA, a Municipal Corporation, and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Order.

The above entitled matter coming on for hearing on the application of plaintiffs for an extension of time in which to file their brief, the court being fully advised in the premises, and finding that a good cause has been shown for such extension,

It is hereby ordered, that said plaintiffs be allowed seven days from this day in which to serve and file their brief on appeal.

Dated this 15th day of September, 1909.

W. O. CHAPMAN, *Judge.*

Entered Jour. 124, Dep't 3, page 60, Sep. 15, 1909.
Filed in open court, Dep't No. 3, Sept. 15, 1909. J. F. Libby, Clerk, By I. C. Swett, Dep.

29 In the Superior Court of the State of Washington in and for the County of Pierce.

No. 27364.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiff-,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants.

Certificate.

STATE OF WASHINGTON,
County of Pierce, ss:

I, J. F. Libby, county clerk and by virtue of the laws of the state of Washington ex-officio clerk of the superior court of the state of Washington, for Pierce county, do hereby certify that the foregoing is a full, true and correct transcript of so much of the record and files in the above entitled cause as I have been directed by the appellants to transmit to the supreme court.

In witness whereof, I have hereunto set my hand and seal of the said superior court at my office in the city of Tacoma, this — day of —— A. D. 1909.

J. F. LIBBY, *Clerk*,
By —— ——,
Deputy Clerk.

Indorsed: Filed in Superior Court Sep. 27, 1909. J. F. Libby, Clerk, By R. E. McF., Deputy.

30 No. 8381.

Department One.

Filed Jan. 21st, 1910.

EDWIN HOWARD and Wife, Appellants,
v.
CITY OF TACOMA and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

Per Curiam:

This case, except that a different piece of land is involved, is almost identical in its facts with, and is governed by the rule announced by Ettor v. City of Tacoma, just decided. Upon the authority of that case, the judgment of the lower court is affirmed.

31 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs and Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and the CHICAGO, Milwaukee and St. Paul Railway Company of Washington, a Corporation, Defendants and Respondents.

Petition for Rehearing.

Come now the appellants Edwin Howard and Emma Howard, by their attorneys, Boyle, Warburton and Brockway and move the court for an order, granting a re-hearing in this cause for the reasons and upon the grounds as follows:

1. The case is controlled by decisions of the United States Supreme Court, not before presented to this Court.

2. Respondents are liable for the damage even though there had never been a statute giving compensation for damages resulting from an original grade. This necessary point we do not find decided in the opinion filed.

3. Chapter 60, of Laws of 1909, relied on by respondents is void even if it could be given a retroactive effect. This necessary point we do not find decided in the opinion filed.

Argument

We believe if the court will read the cases referred to under our first head, it will feel bound in law to grant a rehearing. The second and third grounds involve points necessary to a decision in favor of respondents, and are not touched on in the court's opinion.

In making these statements, counsel have due regard for the weight of a decision rendered after argument, and also for the statement of the court that the point decided dispensed with the necessity of further discussion. The fault is ours in not finding all the cases at the time of the original hearing and in not making our contention plain as to the second and third points.

Briefly recounting the facts that the court understand our argument:

In the summer of 1908 the Elners owned certain lots fronting on 29th street in what is now the Indian Addition to Tacoma, but was then under the sole jurisdiction of the county.

The Howards owned lots fronting on 29th street in what was then and is now the Tacoma Land Company's 7th addition to the city of Tacoma. Said 29th street separated the 7th addition from the Indian addition. The board of county commissioners at that time passed a resolution [illegible] 29th street [illegible] county commissioners [illegible] in the Indian addition [illegible] but also in the 7th addition and in front of Howards' property, over which they had control. [illegible] 29th street, the Indian addition became a part of the city of Tacoma. [illegible] under the direction of the city engineer, [illegible] without any charge [illegible] 29th street [illegible] in front of both the Elners and the Howards [illegible]. At that time there was in force section [illegible] of Laws of 1905, [illegible] 1907, [illegible] 1909 [illegible] for the original grade.

The Elners and the Howards [illegible]

[illegible]

[illegible] Supreme Court of the United States [illegible]

sent of laws — 1907, chapter 158, section 48, is a violation of the Federal Constitution, at least as applied to past transactions.

We must acknowledge ourselves remiss in not finding and presenting to the court for its aid, in our original briefs, all the law bearing on this case. We endeavored to make a thorough search, but owing perhaps to a blot in our mind, which did not agree with that of the decisions, we failed to find the following determinative cases, construing and applying the Federal Constitution to an almost identical case. The cases referred to are:

Muhlker v. New York & Harlem R. R. Co. 197 U. S. 544, 49 Law Ed. 879.

Stoneship Co. v. Inhabs. 2 Wall. 450.

Also Sauer v. City of New York, 206 U. S. 536, 51 Law Ed. 1170, where the doctrine of the Muhlker case is approved, but the case distinguished on the facts.

Considering first the facts to show that United States cases and this case are parallel.

As shown by the record and our briefs, the act of Congress authorizing the platting and sale of Indian addition, was subsequent in time to the original passage of the section as enacted in laws 1907, chapter 158, section 48. The United States government platted the addition. Therefore, these plaintiffs must have bought while the section was in force.

Turning now to the United States cases. In 1883 and 1887, the supreme court of New York held that the light and air coming from a street, could not be taken from the adjacent property owner, by the construction of an elevated railroad, without compensation being made therefor. Subsequently, one Muhlker acquired certain property fronting on a street. Thereafter, in compliance with a directory statute of New York, an elevated railroad was built in front of the property. In an action by Muhlker to recover for the

24 *damage resulting from the obstruction of light and air, resulting, the supreme court of New York attempted to distinguish the earlier cases and held that he was not entitled to recover. Muhlker appealed to the supreme court of the United States, invoking the 14th amendment, and also the "contract" clause of that instrument. The supreme court held that the distinction made by the New York court was not sound, and that the refusal to Muhlker of his right to compensation, was in effect a reversal of the doctrine of the earlier cases and that this could not be done particularly where not only had the property been purchased, but the damage accrued before the reversal. The case is even stronger than ours, since the change in that case was only a change in judicial decisions. They are parallel.*

1. In the Muhlker case, the city obtained the street by a deed "in trust nevertheless, that the same be appropriated and kept open as parts of public streets forever, in like manner as the

1. In our case the city obtained the streets by a dedication of the same as a street, operating "to all intents and purposes as a quit-claim deed for the purposes intended by the donor." Fail-

other public streets and avenues are and of right ought to be."

2. The property claimed to be injured was acquired while it was the law of the state that compensation must be made for consequential damages by the construction of an elevated railway in the street.

3. While this was still the law the property suffered consequential damage by the construction of an elevated road in the street.

35 4. After the infliction of such damage the rule of law was changed.

linger's Code, Sec. 1276, Pierce's Code, Sec. 3556.

2. The property claimed to be injured was acquired while it was the law of the state that compensation must be made for consequential damages by an original grade in the street.

3. While this was still the law, the property suffered consequential damage by the construction of an original grade in the street.

4. After the infliction of such damage the rule of law was changed.

The Supreme Court of the United States (after some discussion as to whether or not the easement to light and air was in itself property), bases its decision as follows, the words in brackets being ours:

However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases (this statute) were the law of New York, (Washington), and assured to him that his easements of light and air (right to compensation for an original grade) were secured by contract as expressed in those cases (such statute) and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

We are unable to see any possible distinction between this case and the Ettor case. Certainly a right growing out of a rule of law laid down by the courts of the state, and a subsequent damage falling within the rule is no more sacred, than a right growing out of
36 statute, and a subsequent damage falling within the statute. And certainly the Federal Constitution is as applicable to the legislature as to the courts.

This decision has never been reversed. In the Sauer case, 206 U. S. 536, 51 Law Ed. 1176, the court recognized the doctrine, and refused to apply it only because the law of New York at the time of the purchase was found to be the same as the declaration of law which it was claimed impaired the obligation of the contract. If, therefore, the judicial determination of the effect on consequential damages of a prior dedication or condemnation, becomes a part of a contract of purchase, effected after such judicial determination, surely a legislative declaration as to the rights of parties after a dedication, made prior to such dedication, will become a part of a contract of purchase affected subsequent to the dedication and legislative enactment. We respectfully submit that as to the Ettor case, this court is bound by this decision of the supreme court of the United States.

In the Howard case, the facts so far as appear by the record, may be slightly different, but not so different, we believe, as to change the rule of the Muhlker case. When the pleadings in the Howard case were originally drawn, it was not anticipated that the statutes would be changed or that the comparative date of its passage, and the acquirement of the property by plaintiff, would ever be drawn into the case. Consequently, we did not allege the date of purchase.

We think, however, that as against a demurrer, interposed almost the day of the passage of the only act which could be deemed to render such matter material, a court of justice, after the opportunity to amend is gone, may well assume that the property, situated in a city where every abstract shows a change of ownership within the last ten years, was in fact, purchased subsequent to 1893, the date of the original passage of the act giving compensation. If the Howard case should go off on this question of the alleged retroactive effect of chapter 80 of the laws of 1909, as determined by the date of the purchase, a sustaining of the judgment on the ground that the date of purchase is not alleged, would result in a miscarriage of justice on a technical point, a miscarriage easily avoided by taking
37 judicial notice, or assuming in support of the complaint that the purchase was made within the last sixteen years, and while the same law was in effect, that was in effect when the damage was done.

Be that as it may, we contend that the other supreme court case cited, is conclusive also of the Howard case. For while the opinion in the Muhlker case is not based on such ground, yet it has been in effect held, that the very grading of the street while a statute was in force, not only requiring compensation, but permitting it to be made after the doing of the damage, (Laws 1905, chapter 55, section 52; Laws 1907, chapter 153, section 53) creates a contract to pay for such damage. It is a universal principle that the law will presume an intention and agreement to perform that which the law declares ought to be performed.

If A enters upon the land of B and cuts down and removes his trees, the law will presume an agreement to pay their value, and B may waive the tort and sue in contract. Forms of pleading are in this state abolished, but the principle of the implied agreement still persists.

Thus in Steamship Co. v. Joleffe, 2 Wall. 450, Mr. Justice Field held that the repeal of a law authorizing a pilot to recover half pilotage from a vessel hailed, but which had rejected his services, did not and could not take away the right of action which had arisen before the repeal. It was the legal duty of the vessel to pay such half fees though the services were rejected, and the law will presume an agreement on its part to fulfil such duty. Such quasi contract the constitution will protect after the repeal of the statute. In our case, the law said, "on or after grading the street you must make compensation." The street was graded. Surely the law will presume a like intent and agreement to comply with its requirements.

So also it has been held by the Montana court that the right of action arising out of the cutting from public lands of trees less than eight inches in diameter, persists, though after the cutting, it was made lawful to cut such trees. The action might be considered as one in tort, or one in contract, but in any event, it vested by the doing of the act, and could not be taken away by the subsequent repeal of the statute. U. S. v. Williams, (Mont.) 19 Pac. 228.

38 Perhaps this doctrine is the true explanation of Graham v. C., M. & St. P. Ry. Co. (Wis.) 10 N. W. 609; Dash v. Van Cleeck (N. Y.) 5 Am. Dec. 291, and James v. Oakland Traction Co. (Cal. App.) 103 Pac. 1082, the first two of which were cited and discussed in our original briefs, and all of which hold that the repeal of a statute does not take away a right of action already accrued and which grew out of the statute. Certain it is that the United States Supreme Court will apply the doctrine if necessary to bring the case within the contract clause of the Federal constitution.

We conclude that the doctrine of the Joliffe case, 2 Wall. 450 controls both the Ettor case and the Howard case, and that the Muhlker case, 197 U. S. 544, 49 Law Ed. 872, controls the Ettor case, and by fair intendment of the facts, rules the Howard case also.

II.

An affirmance of the judgment involves a holding that a city, or those purporting to act under it, may, without liability to abutting property owners, entirely disregard the charter limitations on the power of the city in regard to street grading, without incurring liability to abutting owners for resulting damage.

This has nothing to do with laws 1907, chapter 153, section 48.

The charter provides that the city shall have power "by ordinance only" to grade streets, or establish grades, that the city council "shall by ordinance establish the grade of all streets," that there shall be a report to the council by the commissioner of public works; that there shall be a petition by the property owners, or a two-thirds vote of the council; that there shall be a notice of the improvement with a right to remonstrate. Charter of City of Tacoma, Section 52, subsec. 7, 185; 204; 205; 135.

Appellants' counsel endeavored in their briefs to show that each defendant in the creation of the physical grade and cut herein question, knowingly and wilfully violated every provision of the charter of the city of Tacoma, touching street grades; that such violation de-

39 deprived them of their protection, as a municipal corporation or its agent and rendered them liable for the damages accruing to appellants from their acts, and that such liability was entirely independent of the statutes, and principles referred to in the court's opinion. (Assignment of Error No. 3 in Ettor case; Argument in Ettor opening brief pp. 67-79, inclusive, Ettor reply brief pp. 32-36 inclusive; Howard opening brief pp. 47-59 inclusive; Howard reply brief pp. 20-24 inclusive.) As to the fact of the violation of the city charter, there is no dispute. It is conceded that the grade was established and the work done on the "ipse dixit" of the city engineer, the mayor and certain councilmen without any action by the council whatsoever. And this in the face of express charter requirements that such action may be taken by ordinance "only."

As to the effect of such violation, there is however, a disagreement. Respondents in their briefs contend

1. That as to the Ettor property, the grading was authorized by the action of the board of county commissioners, before the property came into the city.

2. That inherity and by statute a city has power to grade its streets, and that therefore, the charter provisions expressly requiring that it shall be done by ordinance only, and after notice to the property owners, is so much waste paper.

Appellants on the other hand in their briefs contend:

1. That as to the Ettor case, the action of the board of county commissioners did not authorize any grading at all, and certainly did not authorize the particular grade built. This matter is fully taken up in the oral argument and briefs (Ettor opening brief p. 21-33 Ettor reply brief pp. 1-12.) The action of the board gave no rights in 26th street, and at most left the matter of establishing the grade on annexation to the successors of the board, that is to the city council. But the city council never acted. As to the Howard case, it is conceded that the board's action could not effect the street in front of his property, and that the legal effect of the unauthorized action of the city and railroad company, must be determined
40 as though the board had never attempted to interfere.

2. That the charter requirements are valid and mean just what their language imports, and constitute a limitation on the power of the city to grade its streets. This seems so axiomatic that we did not quote authorities in our brief and now content ourselves with quoting the language of this court: "The mode prescribed is the measure of authority."

3. That whenever a municipality, or any one purporting to act for a municipality or in the streets of a municipality undertakes to change the grade of a street contrary to such limitations, whether such grade be an original or a regrade, and in so acting, goes beyond or contrary to the express or implied limitations of the charter, it loses the protection which otherwise covers it as one exercising a governmental power in a lawful manner. We admit what this court said in its opinion and also in the Fletcher case; that by dedication, a property owner consents to the future grading of the

street, even to his damage in the absence of statute, provided, always, that such grading be in a lawful manner. But where the grading is unlawful or in excess of the city's powers, the person or city doing such grading, must answer for the resulting damages. This liability depends, not upon the reasonableness or unreasonableness of the grade per se, nor upon whether the city might or might not have reached the same result had it kept within the bounds of its power, but upon two facts which invariably result in liability:

1. An injury to another;
2. No lawful power to inflict such injury.

In support of this principle, we cited and analyzed a large number of authorities from many jurisdictions. (Ettor opening brief pp. 71-77; Howard opening brief, pp. 51-57.) We also distinguished the one case cited by respondents, in that in such case, as therein pointed out, the city was acting within the bounds of its power. (Ettor reply brief, bottom p. 33 and all of p. 34; Howard reply brief, bottom p. 21 and all p. 22.) We do not care to here
41 renew or reiterate such discussion of authorities. But we do wish to urge that the gist of such decisions is logically and necessarily true.

1. The city in grading the street without following charter limitations proceeded beyond its power.
2. The city in grading the street, injured a property owner.
3. The city and those acting with or under it, is liable.

Now, it is evident that

1. This question has nothing to do with the acts of 1907 or 1909, and was not passed upon in the opinion filed.
2. An affirmance of the judgment constitutes

a. A disregard and refusal to follow the principles and authorities above set forth.

b. An affirmance of the right of any petty city officer or person or corporation, purporting to act under him (the defendant railroad company in this instance) to utterly ruin any property owner, by grading and cutting, leaving the property owner without redress unless he can accomplish the impossible and show what a legislative body, the council, would have done had the matter been properly and legally presented to them.

We do not believe that it was the intention of this court to sanction any such rule, and therefore, request a rehearing that an opininon may be rendered upon the question involved.

III.

Laws 1909, chapter 80, being the so-called repealing statute is unconstitutional, aside from its retroactive effect, and cannot, therefore affect the laws 1905, chapter 55, section 47, laws 1907, chapter 153, section 48, on which we partly rely.

We endeavored to raise and present this point by assignment — error No. 4 in the Ettor case, and by argument (Ettor opening brief, pp. 43 to 48, Howard opening brief, pp. 23 to 28.) It is necessary to decision of the case and does not depend on the unconstitutionality of the act as opposed to the constitutional provisions dealing

with retroactive laws. It is not passed on by the court in
42 the opinion filed, which assumes the validity of the so called repealing act unless invalid on the ground of being retroactive. We conclude that we did not make our argument plain. Endeavoring to rectify such mistake and proceeding by syllogisms.

Syllogism I.

1. Our constitution is plain on this point. Before property can be "damaged," compensation must be made.

2. It is equally plain under the decision of the court that damage resulting from a regrade of street, after improvements thereon is "damage" within the meaning of the constitutional prohibition.
Brown v. Seattle, 5 Wash. 35 on p. 40.

3. Therefore, any statute which attempts to authorize such damage by regrade, before compensation, is unconstitutional.

Syllogism II.

1. Act 1909, chapter 80, by its language does two things only. It authorizes a city in case of a change of grade to

a. Pay for damages resulting therefrom under the eminent domain proceeding elsewhere outlined in the act.

b. To pay for damages resulting from a change in grade by assessment to be raised as the other costs of the work, that is by money to be raised and paid after the damage has been done.

2. The first option given by the language of the section (that is to follow out the eminent domain proceedings in case of a regrade) is already covered by sections one and two of the act of which it is an amendment (Laws 1905, chapter 55, p. 84, Laws 1907, chapter 153, p. 316) which provides that the city may 'damage any property—for the purpose of making changes in the grade of any street—after just compensation having first been made—in the manner prescribed by this act."

3. Therefore the only effect of section 80 of the laws of 1909 was to attempt to authorize a city in case of damages resulting from a change of grade, to do the damage first, and pay for it afterwards.

Syllogism III. Combining I and II.

1. Any statute which attempts to authorize damages to
43 abutting property by a change of grade, before making compensation, is unconstitutional.

2. The only effect of chapter 80 of the laws of 1909, was to attempt to authorize a city to damage abutting property by a change of grade without first making compensation therefor.

3. Therefore, chapter 80 of the laws of 1909 is unconstitutional.

Syllogism IV. Applying Syllogism III.

1. "An amending act which is unconstitutional and void, does not, being a nullity, in any way affect the validity of the act amended.

Especially is this true where the amendment is by implication, or the repealing clase is general, applying only to acts or parts of acts inconsistent with the amendatory statute."

Quotation from Am. & Eng. Enc. of Law, Vol. 26, p. 712.
In re Nolan 21 Wash. 395.

2. Chapter 80 of the laws of 1909, alleged to amend section 47 of chapter 55 of laws 1905, section 48 of chapter 153 of laws 1907, said sections so alleged to be amended, being the ones on which we partly rely, does not expressly repeal or amend such sections and is unconstitutional.

3. Therefore, section 47 of chapter 55 of laws 1905, section 48 of chapter 153 of laws of 1907 are not in any way affected by chapter 80 of the laws of 1909 on which defendants rely.

Conclusion.

We, therefore, respectfully ask a rehearing of both the Ettor case and the Howard case on the three grounds first set forth.

1. The case is controlled by decisions of the United States supreme court.

2. Respondents are liable for the damage even though there had never been a statute giving compensation for damages resulting from an original grade.

3. Chapter 80 of Laws 1909, relied on by respondents is
44 void even if it could be given a retroactive effect.

Respectfully submitted.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

Indorsed: Filed Feb. 16, 1910. C. S. Reinhart, Clerk.

45 Department One.

Filed March 26th, 1910.

No. 8381.

EDWIN HOWARD, Appellant,
v.
CITY OF TACOMA et al., Respondents.

On Petition for Rehearing.

Per Curiam:

The petition for rehearing in this case is denied on the authority of the decision this day filed in the case of Ettor v. City of Tacoma.

46 In the Supreme Court, State of Washington, Tuesday, March 29, 1910.

No. 8381.

EDWIN HOWARD and WIFE, Appellants,
vs.
CITY OF TACOMA and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondents.

Judgment.

The cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pierce county and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now on this 29th day of March, A. D. 1910, on motion of T. L. Stiles, Esquire, of counsel for respondents, considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs, petition for rehearing denied, and that the said City of Tacoma and the Chicago, Milwaukee & St. Paul Railway Co., have and recover of and from the said Edwin Howard and wife and from the United Surety Company, surety, the costs of this action taxed and allowed at Thirty-two & 15/100 dollars, and that execution issue therefor. And it is further *argued* that this cause be remitted to the said superior court for further proceedings in accordance herewith.

47 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Washington:

Your petitioners, the above named appellants considering themselves aggrieved by the final judgment and decision of the above entitled court in the above entitled cause, affirming the judgment of the superior court, dismissing appellants' action with costs and believing that said judgment decision is erroneous for the reasons specified in the attached assignment of errors filed herewith, *that* the said appellants and each of them now pray a writ of error to the

above entitled court from the supreme court of the United States and ask that the amount of the supersedeas bond be fixed.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARLE B. BROCKWAY.

48 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Assignment of Errors and Prayer for Reversal.

Now come the above named appellants and each of them and file herewith their petition for a writ of error and say that there are errors in the record, proceedings and judgment in the above entitled cause and in the denial of appellants' petition for re-hearing of said cause, and for the purpose of having the same reversed in the United States supreme court, make the following assignments of error:

1. The supreme court of the state of Washington erred in denying the claim set up by appellants that the right to receive compensation, accruing to appellants under and by virtue of the laws of 1907, chapter 153 and particularly sections 1, 2 and 48 thereof, said statute being a continuation of the laws of 1893, chapter 84, and said right to receive compensation being for injuries resulting to appellants' abutting and adjacent property by reason of the grading by respondents of East 26th street in the city of Tacoma, which adjoined their premises, was a vested and accrued right, falling within the protection and immunity granted by the 14th amendment of the constitution of the United States, and not therefore subject to be divested by the passage of the Laws of 1909, chapter 80, said statute being passed subsequent to the damage complained of and to the institution of an action against respondents to recover therefor.

49 2. The supreme court of the state of Washington erred in denying the claims specially set up by appellants under and by virtue of article 1, Section 10 of the constitution of the United States to full and complete immunity from the operation and effect of the laws of the state of Washington for 1909, chapter 80, as applied to the right of appellants to receive compensation for injuries resulting to their property by the establishment and construction by respondents of an original grade in 26th street, adjoining their premises, which right to compensation accrued to appellants by virtue of the laws of the state of Washington for 1907,

chapter 153, being a continuation of the laws of 1893, chapter 84, and in effect when appellants purchased their property and when the damage to such property accrued by the establishment of such grade. The court erred in that the ruling just referred to and the effect so given the laws of the state of Washington for 1909, chapter 80, gave such statute effect as a law impairing the obligation of contracts and that in so far as this is a proper construction of said law of 1909, it is opposed to said article 1, section 10 of the constitution of the United States.

3. The supreme court of the state of Washington erred in denying the claim specially set up by appellants under and by virtue of section 1, article 14 of the amendments to the constitution of the United States to have their case determined and their right to compensation adjudicated, without reference to the laws of the state of Washington, for 1909, chapter 80, which statute was passed subsequent to the accrual of appellants' right to compensation, growing out of damage to their property by grading by respondents of East 26th street in the city of Tacoma, Washington, and which statute was construed by the said supreme court to repeal laws of the state of Washington, 1907, chapter 153, section 48, being a continuation of the laws of 1893, chapter 84, and which was in force and effect when said damage accrued and which forbade
50 respondents to grade any street to the damage of abutting property owners, without making compensation therefor, and which said laws of 1909, chapter 80, *was* further construed by the supreme court of the state of Washington as intended and operative to defeat any right to compensation accrued at the time of its enactment under said laws of 1907 and 1893. By such ruling and decision, the supreme court of the state of Washington deprived these appellants of property, without due process of law and by such decision and ruling the supreme court of the state of Washington permitted and caused the appellants to be deprived of their property without due process of law by said chapter 80 of the laws of the state of Washington for 1909.

4. The supreme court of the state of Washington erred in holding that though the appellants might have enjoined the respondents from the grading of East 26th street in the city of Tacoma, to the damage of their abutting property, since there had never been the passage of any ordinance, authorizing said grading as by the charter of the city of Tacoma required, yet not having so enjoined said work, they could not recover damages from either of said respondents on the ground that said work of grading was not so authorized by ordinance.

5. The supreme court of the state of Washington erred in affirming the judgment of the lower court and in denying appellant- petition for a re-hearing.

6. The supreme court of the state of Washington erred in holding that appellants' right to compensation for injuries to their property by the grading by respondents of East 26th street in Tacoma, Washington, which street adjoined said property, which right to compensation arose out of laws of 1907, chapter 153, being a continuation of the laws of 1893, chapter 84, was not a vested right and for

that reason only, was not protected from the operation of the
51 laws of 1909, chapter 80, either under the 14th amendment of the constitution of the United States, or under article 1, section 3 of the constitution of the state of Washington.

7. The supreme court of the state of Washington erred in holding that appellants' property was not "taken or damaged" either by the grading by respondents of East Twenty-sixth street in the city of Tacoma, Washington, or by the deprivation of their accrued right to compensation therefor, which deprivation was affected through the laws of the state of Washington for 1909, chapter 80, and the construction thereof by the courts.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

EARLE B. BROCKWAY.

Prayer for Reversal.

For the above and foregoing errors, the appellants Edwin Howard and Emma Howard, his wife, pray that the said judgment of the supreme court of the state of Washington, entered March 29, 1910, and that said order of the supreme court of the state of Washington, denying appellants' petition for rehearing entered March 29, 1910, and the opinion on which was filed March 26, 1910, be reversed, and the judgment rendered in favor of appellants (the plaintiff-below) and for costs.

BOYLE, WARBURTON & BROCKWAY,
Attorneys for Appellants.

Indorsed: No. 8381. Petition for Writ of Error. Filed Mar. 31, 1910. C. S. Reinhart, Clerk.

52 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and EMMA HOWARD, His Wife, Appellants,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Respondents.

Order Allowing Writ of Error.

Upon reading the petition of Edwin Howard and Emma Howard, his wife, appellants in the above entitled cause, for the allowance of a writ of error to remove said case to the Supreme Court of the United States;

It appearing to my satisfaction that on the 29th day of March, 1910, the final judgment was made and entered by the supreme court of the state of Washington, in the above cause, and that on

the 29 day of March, 1910, an order was made and entered, denying appellants' petition for a re-hearing of said cause; that the said court is the highest court of the state of Washington, in which a decision in said suit could be had; that in said cause, petitioners and appellants in said cause specially set up and claim a title, right privilege and immunity under the first section of the 14th amendment to the constitution of the United States and also under the tenth section of the first article of the constitution of the United States, and that the decision in said supreme court of the state of Washington is against the title, right, privilege and immunity so specially set up and claimed and that in said cause there was drawn in question the validity of chapter 80 of the laws of the state of Washington for 1909, on the ground that said statute is repugnant to the first section of the 14th amendment to the constitution of the United States and also repugnant to the tenth section of the
53 first article to the constitution of the United States and the decision of the supreme court of the state of Washington was in favor of the validity of said statute of the state of Washington;

It is ordered, that the writ of error to remove said cause to the supreme court of the United States issue and that in said writ, Edwin Howard and Emma Howard, shall be named as plaintiffs in error and the city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, shall be named as defendants in error. Said writ shall issue upon plaintiffs in error filing bond in the sum of five hundred dollars ($500.00) conditioned, that they will prosecute their writ to effect and if they fail to make their plea good, shall answer costs and damages. Said bond when approved and said writ, shall operate as a supersedeas.

Dated at Olympia, Washington, this 31 day of March, 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: No. 8381. Order allowing Writ of Error. Filed Mar. 31, 1910. C. S. Reinhart, Clerk.

54 In the Supreme Court of the United States.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs in Error,
vs.
CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants in Error.

Bond.

Know all men by these presents, that we, Edwin Howard and Emma Howard, as principals, and National Surety Company, a corporation, organized and existing under and by virtue of the laws of the state of New York, and duly qualified and authorized to transact the business of a surety company in the state of Washing-

ton, as surety, are held and firmly bound unto the said city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, in the sum of five hundred dollars ($500.00) to be paid to the said city of Tacoma, a municipal corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, their executors administrators and assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 31st day of March, 1910.

Whereas lately at a session of the supreme court of the state of Washington, in a suit pending in said court, between the above named plaintiffs in error and the above named defendants in error, final judgment was rendered against the said plaintiffs in error and the said above named plaintiffs in error, having obtained a writ of error from the supreme court of the United States and filed a copy thereof with the clerk of said court to reverse said judgment;

55 Now, therefore, the condition of this obligation is such that if the said Edwin Howard and Emma Howard, shall prosecute their said writ of error to effect, and if they shall fail to make their plea good, shall answer all damages and costs that may be adjudged, then this obligation be void, otherwise, to remain in full force and effect.

EDWIN HOWARD.
EMMA HOWARD.
By BOYLE, WARBURTON & BROCKWAY,
EARLE BROCKWAY,
Their Attorneys.

[Seal of National Surety Co.]

NATIONAL SURETY COMPANY.
By CHARLES O. BATES,
Resident Vice President.
By W. H. OPIE, *Resident Assistant Sec'y.*

Bond approved and to operate as supersedeas.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: 8381. Bond. Filed Mar. 31, 1910. C. S. Reinhart, Clerk.

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the

State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in said suit between Edwin Howard and Emma Howard, his wife, and City of Tacoma, a Municipal Corporation and the Chicago, Milwaukee & St. Paul Railway Company, a corporation, wherein was drawn in question the validity of *the* treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Edwin Howard and Emma Howard, his wife, as by their complaint appears; We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning
57 the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within sixty (60) days, from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller — Justice of the United States, the 1st day of April, in the year of our Lord one thousand nine hundred and ten.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Ninth Circuit, Western District of Washington,
By SAM'L D. BRIDGES,
Deputy Clerk.

Allowed to operate as a supresedeas, by—

____ ____,
Chief Justice of the Supreme Court of the State of Washington.

58 [Endorsed:] 8381. Filed Apr. 2, 1910. C. S. Reinhart, Clerk.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to City of Tacoma, a Municipal Corporation, and the Chicago, Milwaukee & St. Paul Railway Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Washington, wherein Edwin Howard and Emma Howard, are plaintiffs in error and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Rudkin, Chief Justice of the Supreme Court of the State of Washington, this 14 day of April, A. D. 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court of the State of Washington.

Attest:

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

60 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation on the therein-named City of Tacoma a Municipal Corporation by handing to and leaving a true and correct copy thereof with T. L. Stiles as Attorney of record for defendant in error City of Tacoma personally at Tacoma in said District on the 14th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal,
By I. S. DAVISSON, *Deputy.*

Marshal's fees $2.06.

61 Form No. 282.

Return on Service of Writ.

UNITED STATES OF AMERICA,
Western District of Washington, ss:

I hereby certify and return that I served the annexed Citation on the therein-named Chicago, Milwaukee and St. Paul Railway Company by handing to and leaving a true and correct copy thereof with Herbert S. Griggs as Attorney of record for defendant in Error Chicago, Milwaukee & St. Paul Railway Company personally at Tacoma in said District on the 14th day of April, A. D. 1910.

C. B. HOPKINS,
U. S. Marshal,
By I. S. DAVISSON, *Deputy.*

Marshal's fees $2.06.

62 [Endorsed:] 8381. Filed Apr. 27, 1910. C. S. Reinhart, Clerk. U. S. Marshal's Civil Docket No. 3342.

63 In the Supreme Court of the State of Washington.

EDWIN HOWARD and EMMA HOWARD, His Wife, Plaintiffs and Appellants,

vs.

CITY OF TACOMA, a Municipal Corporation, and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a Corporation, Defendants and Respondents.

Certificate.

I, Frank H. Rudkin, Chief Justice of the Supreme Court of the state of Washington, do hereby certify that this suit was brought by the appellants Edwin Howard and wife, to recover for damages claimed to have been caused to their property situated on East 26th street in the city of Tacoma, a city of the first class, by an original street grade of said 26th street by the defendant, the Chicago, Milwaukee & St. Paul Railway Company, alleged to have been acting in connection with and under purported authority of the other defendant, the city of Tacoma; that at the time said grading was done, there was in force and effect in the state of Washington, Section 48, Chapter 153 of the Laws of 1907, which section was a re-enactment of identical sections in prior laws which had been in effect since 1893; that this section had been interpreted by this supreme court as giving a right of compensation to property owners, whose property had been injured by the original grading of a street, by or under the authority of a city of the first class, and did give such right. Appellants as one of the grounds of recovery, relied on said section and the said interpretation thereof by this court. After the commencement of the action and prior to the rendition of the judgment, the legislature of the state of Washing-

ton enacted Chapter 80 of the Laws of 1909. Defendants Chicago, Milwaukee & St. Paul Railway Company, and the city of Tacoma each contended in this court, that the right to compensation given by section 48, chapter 153 of the Laws of 1907 and prior identical laws, was taken away and destroyed by Chapter 80 of the
64 Laws of 1909 not only as to subsequent damages, but as to damages which had accrued at the time of the enactment of said Chapter 80, and for which suit had been commenced at the time of the enactment of said Chapter 80.

Plaintiffs being appellants in this court, contended in this court, that their right to compensation was a vested and accrued right at the time of the enactment of Chapter 80 of the Laws of 1909, and that to give such statute a construction which would deprive them of such right to compensation, would be in effect a deprivation of property without due process of law and in violation of the 14th amendment to the constitution of the United States.

Plaintiffs being appellants in this court further contended in this court, that the record showed that they had purchased the property while Chapter 153 of the Laws of 1907 or prior identical laws were in force and effect; that their right to recover compensation for injuries by an original grade under such statute was in effect, a contractual right of which the legislature could not deprive them and that any attempt by the state legislature or the court to deprive them of such right after they had purchased, was in violation of Article 1, Section 10 of the Constitution of the United States, forbidding any state to by law impair the obligation of a contract.

This court refused to sustain either of the contentions of plaintiffs, appellants in this court, and held that the right to compensation granted by Section 48, chapter 153 of the laws of 1907, was not a vested right, but was subject to legislative change after the damage complained of and before judgment. This court further held that Article 1 of section 10 of the Federal constitution did not govern a right to compensation for injury to property by an original street grade, when such right to compensation arose solely out of a statute in effect at the time the property was purchased. The determination of the case by this court in favor of respondents and against the plaintiffs and appellants, is based upon the two holdings above set forth.

Dated this 5th day of May, A. D. 1910.

FRANK H. RUDKIN,
Chief Justice of the Supreme Court
of the State of Washington.

Indorsed: 8381. Filed May 5, 1910. C. S. Reinhart, Clerk.

65 In the Supreme Court of the State of Washington.

No. 8381.

EDWIN HOWARD and WIFE, Appellants,
v.
CITY OF TACOMA et al., Respondents.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause. And, in pursuance of the Writ of Error heretofore filed in this cause, I now transmit the same, together with the original Writ of Error and the original Citation, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed my official seal at Olympia, this 12th day of May, 1910.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court of the State of Washington.

Endorsed on cover: File No. 22,212. Washington Supreme Court. Term No. 69. Edwin Howard and Emma Howard, his wife, plaintiffs in error, vs. City of Tacoma and Chicago, Milwaukee & St. Paul Railway Company. Filed June 2d, 1910. File No. 22,212.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 69

EDWIN HOWARD, EMMA HOWARD, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA, A MUNICIPAL CORPORATION, AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PLAINTIFFS IN ERROR.

S. WARBURTON,
JOHN M. BOYLE,
E. B. BROCKWAY,
C. M. BOYLE,
Attorneys for Plaintiffs in Error.

(No. 22,212.)

SUBJECT INDEX.

LIST OF CASES REFERRED TO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 69.

EDWIN HOWARD, EMMA HOWARD, PLAINTIFFS IN ERROR,

vs.

CITY OF TACOMA, A MUNICIPAL CORPORATION, AND THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PLAINTIFFS IN ERROR.

Statement.

In the year 1893 the State of Washington passed an eminent domain act, relating to cities of the first class, which provided in section 1 that "every city of the first class is hereby authorized and empowered to condemn land and property" for streets or for street improvements, "and to

damage any land or other property for any such purpose, or for the purpose of making changes in the grade of any street * * * and to condemn land and other property and to damage the same for any public use within the authority of such city after just compensation having been *first* made or paid into court for the owner in the manner prescribed by this act."

Section 2 provided, "When the corporate authorities of any such city shall desire to condemn land or other property, *or damage the same for any purpose authorized by this act*, such city shall provide therefor by ordinance," etc. Following this are detailed provisions for the exercise by the city of the right of eminent domain in such cases, for the payment of the damages by the city before doing the damage, and the raising of the money by special assessments to recompense the city for the payment of such awards. All of these provisions, however, down to section 47, contemplate the payment of the award before the taking or damaging of the property.

Section 47, concerning which and its alleged repeal this case centers, reads as follows:

> "If any street, avenue or alley, or the right to use and control the same for purposes of public travel, shall belong to any city, and such city shall establish a grade therefor, which grade requires any cut or fill, damaging abutting property, the damages to arise from the making of such grade may be ascertained in the manner provided in this act, but such city may provide that the compensation to be made for such damage, together with the accruing costs, shall be added to the cost of the labor and material necessary for the grading thereof, and shall be paid by assessment upon the property within the local assessment district defined by law or the charter or ordinances of such city in the same manner and to the same extent as other expenses of such improvement are assessed and collected. In such case it shall not be necessary to procure the appointment of commissioners or take the other proceedings herein provided for making such assessments, but all the proceedings

for the assessment and collection of such damages and costs shall, if so ordained by such city, be governed by the charter provisions, law or ordinances in force in such city for the assessment and collection of the cost of such improvements upon property locally benefited thereby: *Provided, however*, That this section shall apply only to the *original* grading of such street, avenue or alley."

It will be noticed that this section authorizes the city to damage abutting property by an *original* grade, but requires it to be accompanied by one of two acts:

First, the city may proceed by eminent domain, and pay the compensation before doing the damage; or,

Second, the city may include the damage in the general cost of the work, to be paid for as the rest of the work is paid for, in which event, under the laws as to street improvements and payment therefor by special assessment, the payment would not be made until the damage was done.

Laws of Wash., 1893, CLXXXIV, sections 1-47, pp. 189-207.

This statute, with amendments not material to this discussion, was continued as the law of the State through Ballinger's Code, sections 775-821; Laws of Wash., 1905, c. 55, sections 1-48, pp. 84-101, and Laws of Wash., 1907, c. 153, sections 1-48, pp. 316-336.

The following facts were alleged in the amended complaint, as further amended by stipulation, forming the basis of the action:

In October, 1906, the defendant, the Chicago, Milwaukee and St. Paul Railway Company, desiring for its own purposes a vacation of "M" and "N" streets, within certain property platted as Indian Addition to the city of Tacoma, but which was not yet annexed to or a part of said city, petitioned the Board of County Commissioners of Pierce county, who had jurisdiction of the streets therein, for an order vacating such streets.

On October 31, 1906, the board passed an order vacating said streets "subject to the following terms and conditions:"

> "1. That the said Chicago, Milwaukee & St. Paul Railway Co., its successors and assigns, shall, before this order of vacation becomes operative, at its, or their own expense, and without cost or charges to or upon the said county of Pierce, improve 26th street between East 'L' street and Bay street, in Indian Addition to the city of Tacoma, Pierce county, Washington, by grading and making a satisfactory roadway thirty feet in width along the center of said 26th street, between said limits, and by laying and constructing a good and sufficient plank sidewalk on one side of said South 26th street, *as directed by the said Board of County Commissioners of Pierce county, from said East 'L' street to East 'P' street, in said Indian Addition.*
>
> "The work and improvement shall be *done upon order of the said Board of County Commissioners, and according to plans prepared or approved by the said board* or the County Surveyor of said Pierce county, and to the satisfaction and approval of the said Board of County Commissioners of Pierce county, and shall in any event be completed to the satisfaction and approval of said board before the said railway company, its successors or assigns, shall permanently fence or take exclusive possession of said vacated portions of 'M' and 'N' streets, and shall be done within *ninety days after being notified by said board* to do said work and improve said street.
>
> "2. The said Chicago, Milwaukee & St. Paul Railway Company, its successors and assigns, shall pay all damages which the county of Pierce may become liable for resulting to any person, persons, firm or corporation, or property, by reason of such vacation, and the said railway company, its successors and assigns shall forever hold the said county of Pierce harmless from all such claims and damages.
>
> "3. Upon the failure of the said Chicago, Milwaukee and St. Paul Railway Company, its successors and assigns, to comply with all of the above terms and conditions, the said vacation shall become null and void and of no force and effect." (Plaintiff's amended complaint, Exhibit "B," Printed Record, pp. 8-9.)

Plaintiff's property, while fronting on 26th street, between East "L" and Bay streets, and so in terms covered by the order, was in said Indian Addition, or the jurisdiction of the County Commissioners, but was within the 7th Addition to the city of Tacoma, and at that time a part of the city. (Amended Complaint, paragraph VIII. Printed Record, p. 5.)

Nothing further was done by the railway company, the board or the County Engineer under the order of vacation until after August 19, 1907, on which date the Indian Addition was also taken into the city of Tacoma and became in all manner subject to the control of said city. (Amended Complaint, paragraph III. Printed Record, pp. 2-3.)

During the month of May, 1908, the defendant, Chicago, Milwaukee & St. Paul Railway Company, commenced to change the surface of 26th street in front of plaintiffs' property and notified the city of Tacoma through its Commissioner of Public Works and City Engineer of its intent to grade said street and change the surface thereof. Thereupon the Commissioner of Public Works of the city and City Engineer and members of the City Council inspected the proposed work and made and directed changes in the proposed plan for constructing the roadway and the street, increasing the fills and cuts proposed to be constructed by the railway company, and directed that the work be done under the direction of the Commissioner of Public Works and the City Engineer. Thereupon in pursuance of such verbal order and direction of the City Engineer, and with the knowledge and consent of the City Council of the city of Tacoma, and the Mayor of said city, the defendant railway company changed the former surface of the ground on 26th street in front of plaintiffs' property. (Amended Complaint, paragraphs III, IV and V. Printed Record, pp. 2, 3, 4.) No ordinance was ever passed by the City Council of the city of Tacoma establishing a grade in front of plaintiffs' property and said street was not improved and said roadway was not constructed in conformity with any grade established on said

street by ordinance of the city or City Council, and the city did not authorize the said grading by any resolution of the council, but all the work and improvement was done by the company under the wrongful oral direction of the Commissioner, City Engineer and City Council, under a pretense of complying with the provisions of the old order of the Board of County Commissioners, which never did have any authority over plaintiffs' property or the street in front of it. (Amended Complaint, paragraph VI. Printed Record, p. 4.) After the completion of this work the city adopted it by vacating "M" and "N" streets, as called for by the order of the Board of County Commissioners and by permitting the railway company to use said "M" and "N" streets and by using said 26th street as improved and as a roadway. (Amended Complaint, paragraph VII. Record, pp. 4, 5.) The grading done in front of the plaintiffs' property damaged plaintiffs' property in a large sum. (Amended Complaint, paragraph VII. Printed Record, p. 4.)

The city charter of Tacoma, of which the courts take judicial notice, contained numerous provisions requiring grades to be established by ordinance only (charter of city of Tacoma, section 52, subsection 7; also section 185, prohibiting the vacation of streets except by petition of the property owners), or except for public purposes (charter, sections 204, 205). Other sections gave the property owners a right to be heard by the City Council before the establishment of any grade or the doing of any grading (charter, section 135). The complaint shows that no attention was paid to any of these requirements; no formal action of any kind was taken by the council. On the contrary, the railway company, without any attempt to comply with the charter, went upon the street and made the grade and fill as called for by the plans of the City Engineer, to the great damage of the plaintiffs' abutting property. The amended complaint does not show whether the 7th Addition, in which the plaintiffs' property was situated, was platted or became a part of the

city prior to 1893, the date of the original passage of the statute. Nor does it show the date of plaintiffs' purchase of the property, further than that he owned it at all times during the acts alleged in the complaint.

In 1905, and prior to any of the matters herein alleged, the Supreme Court of the State of Washington construed the State Constitution relating to the damaging of property for public use, and the statute above set forth, as applied to the damage of abutting property by the establishment and construction of an original street grade.

Fletcher *vs.* City of Seattle, 43 Wash., 627, decided September 29, 1905. A fuller discussion of this case will be found in the argument; but, briefly stated, the doctrine laid down was as follows:

First. That the *constitutional provision* prohibiting the damaging of property for a public use, without first making compensation, does *not* apply to the damages accruing to abutting property by the establishment and construction of an original grade.

Second. That the *statute* above set forth does require a city establishing an original street grade which damages abutting property to provide compensation therefor, as set forth in section 48 of the act of 1907, and that a failure so to do justifies an action against the city to recover the damages suffered.

With the law and the facts in this condition, plaintiff in error commenced his action in the Superior Court against both the city and the railway company, to recover his damages suffered. While a similar action (Ettor *vs.* City of Tacoma, now pending before this court) was pending, and before its final determination, the legislature of the State of Washington passed the act of 1909 (Laws of 1909, ch. 80), effective immediately on passage, by which section 48 of chapter 153 of the Laws of 1907 was amended in the proviso thereof by the insertion of the word *"not"* instead of "only," so as to read:

"Provided, however, that *this section* shall *not* apply to the original grading of such street." No other provision of the act was amended. The act as amended provided that the city might "damage land for any * * * public use within the authority of the city, after just compensation having been made," etc.; that when the city desired to damage property for any purpose authorized by the act, it should proceed in a certain manner, that when the city desired to damage property by the establishment of a grade it might pay the compensation in another manner, "provided, however," that this last procedure shall *not apply* to the *original* grading of such street.

Defendant in error immediately called the attention of the trial court to this change in the law, withdrew its answer, and interposed a demurrer to the amended complaint, and the court held that the effect of the amendment was to deprive plaintiff of any right to recover for the damage suffered by the grading so completed without any pretense of first making or providing for the compensation required by the law in force when the grading was done and the damage suffered. Accordingly a judgment of dismissal was entered, from which plaintiff appealed to the Supreme Court of the State. On the original trial and on the appeal, plaintiff in error contended that to give the amendment of 1909 such an effect as to defeat plaintiffs' right of recovery for the damage resulting from the construction of the grade, without making the compensation required by the law in effect at the time the work was actually ordered and done and the damages suffered, was in direct violation of the Fourteenth Amendment to the Constitution of the United States, forbidding any State to deprive a citizen of property without due process of law, and also of article I, section 10, of the Constitution of the United States, forbidding any State to pass a law violating the obligation of a contract. The State Supreme Court held that the effect of the amendment of 1909 was to do away with any right of recovery for the estab-

lishment of an original grade, growing out of the act of 1907, and previous years, in force when the grading was done and the damage accrued, and that such effect was not contrary to either clause of the Federal Constitution invoked by plaintiff in error. On the entry of the judgment of affirmance, based on these decisions, this writ was sued out to the Supreme Court of the United States.

Assignments of Error.

Plaintiffs in error set out the following assignments of error. The Supreme Court of the State of Washington erred—

1. In holding that the effect of the Laws of Washington, 1909, c. 80, as interpreted by said Supreme Court, so as to prevent a recovery for the damages inflicted on plaintiffs in error by defendants in error in the establishment and construction of the grade before the passage of such act and while the Laws of 1907, c. 153, were in full force and effect, was not to deprive plaintiffs in error of their property without due process of law, as forbidden by the Fourteenth Amendment to the Constitution of the United States.

2. In holding that no contractual obligation to recompense plaintiffs in error, within the protection of article 1, section 10, of the Federal Constitution, arose from the establishment and construction by defendant in error of the original grade abutting on the property of plaintiffs in error, to their damage, while Laws, 1907, c. 153, sections 1-48, inclusive, were in force, requiring the making or providing for compensation for such damages before the city should cause them, and that therefore no such obligation was violated by the retroactive effect given Laws, 1909, c. 80.

3. In affirming the judgment of the Superior Court dismissing the action as to the defendant, the City of Tacoma.

4. In affirming the judgment of the Superior Court dismissing the action as to the defendant, the Chicago, Milwaukee & St. Paul Railway Company.

ARGUMENT.

The above statement fairly presents four questions for determination by this court:

1. Did the right to compensation for the damages suffered by plaintiffs in error, accruing to them by virtue of the statute in force when the damage was done, constitute "property" within the meaning of the Fourteenth Amendment to the Federal Constitution?

2. If so, did the amendment of 1909, as interpreted by the State Supreme Court, deprive them of that property without due process of law?

3. Did the plaintiffs in error have any contractual right to compensation for damages resulting from the original grade, growing out of the completion of the original grade to plaintiffs' damage, under a statute authorizing such grading only on the making or providing for compensation?

In determining these questions we assume that this court will be governed by the rules heretofore adopted in such cases.

1. Whenever rights growing out of a State statute are alleged to be within the protection of the Federal Constitution, and to have been defeated by subsequent State action, the Supreme Court of the United States will determine for itself and independently of the ruling of the State court as to the nature of such rights conferred by the original statute, and as to whether or not such rights are in fact within the Federal Constitution.

Jefferson Branch Bank *vs.* Skelly, 66 U. S., 431; 17 Law Ed., 173.

Bridge Proprietors *vs.* Hoboken Land & Imp. Co., 68 U. S., 116; 17 Law Ed., 571.

Chicago, B. & Q. R. Co. *vs.* State of Nebraska *ex rel.* Omaha, 170 U. S., 57; 42 Law Ed., 948.

Douglas *vs.* Commonwealth of Kentucky, 168 U. S., 488; 42 Law Ed., 948.

In the particular case at bar, as more fully appears in the argument, the construction of the original statute which this court would be bound to make from the statute itself is also the one which the Washington Supreme Court had adopted at the time the injury complained of arose. This being true, the proper construction of the original statute will admit of no doubt.

2. The Supreme Court of the United States will accept the holding of the State court as to what the legislature intended by the amendatory act of 1909. If the legislative intent so determined involved a deprivation of property without due process of law, or the violation of a contract, then the amendment is void, though this court might not originally have adopted such interpretation of the amendment.

Smiley *vs.* Kansas, 196 U. S., 447; 49 Law Ed., 547.

Gatewood *vs.* North Carolina, 203 U. S., 531; 51 Law Ed., 305.

Armour Packing Co. *vs.* Lacy, 200 U. S., 226; 50 Law Ed., 451.

Missouri, K. & T. R. Co. *vs.* McCann & Smizer, 174 U. S., 580; 43 Law Ed., 1093.

Passing then to a consideration under these principles of the Federal questions involved.

I. THE RIGHT TO COMPENSATION FOR THE DAMAGES SUFFERED BY PLAINTIFFS IN ERROR, ACCRUING TO THEM BY VIRTUE OF THE LAW OF 1907, AND PRIOR IDENTICAL STATUTES, WAS "PROPERTY" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It is a very well settled rule of law that a city can act only in accordance with legislative authorization, and that if it is authorized to do a thing in a certain manner, or on certain conditions only, and does it otherwise, and damage results

from such action, it is liable for such damage. Particularly would this be true where authority to damage is coupled with an express requirement for compensation for such damage by a certain method. No further statute authorizing an action to recover for damages inflicted without complying with such requirement is needed. The right of action in such a case flows by force of the common law from the failure of the city to comply with the statutory requirement. The case before the court is such a case. Section 1 of the act reads:

> "Every city of the first class *is hereby authorized and empowered* to condemn land and property for streets * * * and for the opening of any street * * * and *to damage* any land or other property for such purpose, * * * and *to damage* the same *for any other public use* within the authority of such city after just compensation having been first made or paid into court for the owner *in the manner prescribed by this act.*"

Section 2 provides "that when the corporate authorities shall desire to * * * *damage the same* (property) *for any purpose authorized by this act,* such city *shall*" proceed by ordinance making provision for compensation.

Now it is perfectly plain that under this statute the city is authorized to "damage" property, as the term is used in the statute and sections, *only* on making compensation therefor. So far as the force and effect of the statute are concerned, it is immaterial whether the "damages" covered by the statute are the same "damages" referred to in the constitutional inhibition against damaging property without first making compensation therefor. If the statute stood absolutely alone, still it would prohibit a city from "damaging" property, as the term is there used, without making the compensation therein provided. If it damages property *without* making the compensation required by the statute, it is doing an unlawful act, because acting in a manner contrary to the statute, and must answer therefor, as any other wrongdoer.

The statute is *not* one specifically giving a *right of action;* it *is* one prescribing the only way and circumstances in which a city may lawfully damage property, and it is by force of the common law, that the right of action flows from an *unlawful* damage by a city inflicted without complying with such requirement.

The effect of the law is to declare unlawful any "damage" of property by a city unless the procedure therein outlined is followed, and the unlawful quality of the act is in no way mitigated though the "damage" therein referred to may not be further protected by the constitutional inhibition as to prior compensation for damages by the public authorities.

But if these sections stood alone it might be argued that the term "damage," as there used, was meant to be synonymous with the same term as used in the constitutional inhibition, and that therefore the act would *not* render unlawful a "damage" of abutting property by an original grade. Section 48 of the act, however, disposes of this argument, for by the terms of section 2 the act applies to *any* damage *for any purpose authorized by this act.* And section 48 very plainly authorizes damages for the purpose of an original grade. Indeed, it would seem that the legislature had in mind the doctrine that the State Constitution as to damaging for a public use does not apply to damages arising from an original grade, and intended to make it perfectly plain that the *statute did* include such damages; for as to all other damages the statute, in accordance with the Constitution, requires the compensation to be first made, while as to damage by an original grade only the city is authorized to make the compensation either before or after. The gist of the whole act is and can be nothing else than this:

The city may damage property "for any public purpose" and "for any purpose authorized by this act" on condition only of complying with the requirements of this act. The city may damage property by an original grade only on two conditions: either on complying with the requirements, as

in other cases of damage, or by making compensation afterwards in a particular manner. If section 48 were an enactment standing by itself it would still have this meaning, for authority to a city to do an act on certain conditions is equivalent to denying it authority to do it otherwise. But when it is considered in connection with section 2, which expressly demands that whenever the city shall desire to damage property for "any purpose authorized by the act" it shall do so by ordinance making provision for compensation, there is no room for construction left.

Whenever, therefore, the city damaged property by an original grade without complying with the act, and either making compensation before the grading or making provision for its payment thereafter, it did an unlawful act, for which it was answerable, not because the statute gave a right of action, but because the statute made the act unlawful. This is the only reasonable interpretation of the act, and it is the interpretation which the Washington Supreme Court had announced at the time the injuries complained of occurred. And while we understand it to be the duty of the Supreme Court of the United States to determine such question for itself, still added cogency is given to the argument when it is the interpretation given it by the Supreme Court of Washington.

The case of Fletcher *vs.* Seattle, 43 Wash., 627, decided in 1906, was first heard without reference to the statute now under consideration, and the court held that the State constitutional inhibition against damaging property for a public use without first making compensation did not apply to damages (as distinguished from actual entry or taking) by the establishment of an original grade. This on the theory that such damages were considered and compensated for or relinquished by the property owners at the time of the original plat.

The case coming on for rehearing the attention of the court was called to the statute now under consideration and the court said:

"It is contended by the learned counsel for the city that the right is not conferred by this section, that the statute should be strictly construed, and that it does not contemplate a cause of action for consequential damages; that it merely provides that where a street is graded in such manner as to damage abutting property, the city may provide that the compensation to be made for such damages should be assessed to the cost of the grading, and assessed against the abutting property in the manner provided by the charter provisions in force in said city for the assessment and collection of cost of such improvement on the property benefited thereby, and that *if a cause of action had been given for such class of damages* the grant would have been express and explicit; that the object of the statute is to enable the city to include damages for actual trespass upon private property in the construction of the improvement and that the damage referred to should be construed to be such damages as the property owner has the right of action for under other statutes or constitutional provisions, or by force of the common law. It does not seem to us that this position is tenable. We think the word 'damages' used in the section has the same significance and meaning that it has in *other sections of the same act, and that it was used in its broad sense and includes consequential damages.* We see no reason why this provision of the law should be segregated from the other provisions, and a different construction placed upon it, *or why the provisions of the act in relation to the assessment of the damages should not apply to it as it does to the other sections and if it does the right of compensation is equally granted.*"

In other words, the Washington Supreme Court holds that the provisions of sections 1 and 2 of the act, *expressly* requiring a city to make compensation as a necessary condition to the rightful damaging of the property, apply to the consequential damage of abutting property by an original grade referred to in section 48, and that this being true, it was not necessary that there be given any explicit right to recover by action where such steps were not taken. The right of action flowed from the violation of this statute.

Further on the court used the following language:

> "Section 2 says, when the corporation authorities of any such city shall desire to condemn land or other property or damage the same for any purpose authorized by this act such city *shall provide*, etc. In this case the city had the power to damage the respondents' land, and it was found that it did damage it and *it damaged it in a way that it was authorized by sec. 47 of this act;* namely, by establishing a grade on the street upon which their property abutted."

And the city having so damaged the property "as authorized by the act," but without following the conditions imposed by the act, was of course held liable for the injury in the action brought to recover for such illegal act.

A right of action for damages resulting from the construction of an original grade by a city which has not made or provided for compensation in the manner required by the act being, then, a right of action for an act made unlawful by the statute, we proceed to determine whether such a right is "property" within the meaning of the Fourteenth Amendment to the Federal Constitution.

And in the first place it may be laid down as a general rule that a vested right of action is property, and as much protected by the Fourteenth Amendment as land or money.

Numerous authorities to this general and unquestioned statement might be cited, but we content ourselves with two which no one will question.

> Cooley Const. Lim. (4th ed.), p. 449.
>
> Angle *vs.* Chicago, St. P., M. & O. R. Co., 151 U. S., 65; 38 Law Ed., 55.

The Angle case was one in which there was properly before this court the validity of what was alleged to be an attempt by the legislature to do away with the right of action arising out of a tort committed prior to the passage of the act, and the court used the following language:

"But it must be remembered that the wrongs of the Omaha company were done before the legislature passed either the act of 1882 or that of 1883, and it is to redress those wrongs that this suit was brought. Can it be that the legislature, by passing these acts, condoned the wrongs, and relieved the Omaha from any liability to the Portage company? Did the resumption of the land grant and the regrant to the Omaha company make lawful its acts in bribing the officers of the Portage company? Did it relieve the Omaha company from any liability for the wrongful use of the process of the courts in the injunction? Could it act judicially and in effect decree that the wrongs done by the one company to the other created no cause of action? *A right of action to recover damages for an injury is property;* and has a legislature the power to destroy such property? An executive may pardon, and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong, or relieve the wrongdoer from liability to the individual he has wronged."

We are aware that there are numerous decisions of this court, prior to the adoption of the Fourteenth Amendment, holding that there is nothing in the Federal Constitution to prevent a State from passing a retroactive law, as to other than a criminal or contractual matter, and not, therefore, either *ex post facto* or within the inhibition against the violation of contracts. But these decisions, so far as we know, were before the adoption of the Fourteenth Amendment, and are not in conflict with the Angle case, *supra*, decided since the passage of such amendment, and which expressly holds that a cause of action for tort *is* property which a legislature cannot destroy.

Unless, therefore, there is something peculiar in a cause of action *arising out of a violation of a statute*, taking it out of this general rule, the cause of action presented by this case was property, and as such protected from legislative interference. It was at this point that the State Supreme Court,

in our opinion, fell into its first error. It held that the effect of the amendment of 1909 was to repeal section 48 of the act of 1907 and prior years; that if the rights given by the act of 1907 were substantive we were right in our contention, but that we were, in truth, merely asking for the enforcement of a cause of action, given only by statute, and that such cause of action fell with the repeal of the statute. We quote the argument of the court:

> *"The right in this case is statutory, and a pending action, at whatever stage, falls with the statute.* There is a marked difference between the creation of a new or cumulative remedy for an existing right and the creation of the right itself. That the repeal of a statute conferring jurisdiction *or creating a right of action,* without a saving clause, takes away all right to proceed, and that the repealed act will be considered as if it never existed, except for the purposes of those actions or suits which have been prosecuted and concluded while it was an existing law, has been so often stated in the books that it has become axiomatic. It is even held that a repeal after judgment, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charged the appellate court with the duty of declaring the litigation ended without right of further prosecution." * * *
>
> "As will be seen by reference to these authorities, the rule is applied by the courts *in all cases* where the right depends on the remedy, for the rule is universal that there is no vested right in a particular remedy *unless the remedy is a part of the right itself.*"

The vice of this argument and holding is twofold:

First. Neither reason nor authority will support the argument in the broad form stated.

Second. As we have already shown, this is not a mere cause of action given by a statute, but a right of action arising from a violation of the statute from the doing of an unlawful act.

In discussing the question as to how far a right of action

given by a statute can be affected by a subsequent repeal of the statute, it may be admitted that there is authority for the holding that *penalties unrecovered* when the statute giving them is repealed fall with the statute. But these cases are based on the theory that a penalty is a peculiar form of obligation or punishment imposed by the sovereign, and whether by virtue of the particular statute imposing the penalty, or by reason of the very fact that it *is* in the nature of a punishment, may be remitted by the sovereign which imposed it. Therefore any right to the penalty prior to its actual collection from the wrongdoer must be necessarily inchoate and subject to this power or remission. Furthermore, in the only case in which this court has upheld such doctrine, the court has deemed it necessary to first determine that the particular statute imposing the penalty itself contained authority for its remission by the Government.

U. S. *vs.* Morris, 10 Wheat., 246.
Confiscation Cases, 7 Wall., 454.

But even if this rule is well founded, it has no application here, for whatever else the Law of 1907 may have been, it certainly was not a statute imposing a penalty.

So also there are cases of curative statutes held to violate no vested right though they operate retrospectively. But these are cases of mere irregularity, which might be cured by the State, and where the right claimed to be vested was inequitable in its nature and became vested, as stated by Chancellor Kent, "subject to the equity existing against them and which the statutes recognized and enforced."

Kent's Commentaries (12th ed.), vol. I, p. 517, p 456.

And, as further observed by the same eminent authority at the same place, such cases "cannot be extended beyond the circumstances on which they repose without putting in jeopardy the energy and safety of the general principles." And surely no one can seriously contend that the act of 1909

is a curative or ratification statute, or that, if it were, the rights already accrued, and which it is claimed to divest, contain any element of inequity. On the contrary, they are most just and equitable.

But the largest class of cases, and those concerning which there has been the most dispute, are those in which it has been held that the repeal or amendment of a statute giving a new or cumulative remedy defeats all actions pending at the time of the repeal. As already stated, prior to adoption of the Fourteenth Amendment this court had no concern with such State statutes except as they might involve the obligation of a contract. And in the discussion of this question expressions have been used both by courts and text writers which, when taken aside from their connection, would seem to indicate that under all circumstances the repeal of a statute necessitates the determination of pending cases as though the statute had never been passed. But no such sweeping statement will stand the test either of reason or authority. Stated briefly, the doctrine of this court on such matters is as follows:

Though the form of a statute may be remedial, yet if the rights therein given are in truth substantive the subsequent repeal or amendment of the statute will not affect rights existing under the statute.

Barnitz *vs.* Beverly, 163 U. S., 118; 41 Law Ed., 93, citing and affirming numerous former decisions.

And this same rule applies where the statute repealed declares that one shall have a right of recovery. The substantive right involved persists after the repeal.

Steamship Co. *vs.* Joliffe, 2 Wall., 450.

It is true that these are cases in which the substantive rights in question were those involved in the obligation of a contract. But if the constitutional inhibition against the violation of a contract will prevent the rule that the effect of a statute dies with its repeal from operating to divest con-

tractual rights incurred thereunder, we see no reason why the constitutional inhibition against the deprivation of property will not also prevent such rule from operating to divest property rights accrued under the statute. Underlying the holding of the State court is the assumption that rights accruing under a statute giving a new cause of action cannot be "property," for the reason that the rights so accrued are subject to be divested at will by the repeal or amendment of the statute. If this assumption were correct it would follow that neither could the provisions of a statute giving a new right of recovery constitute "contractual obligations," for the same reason that all implied statutory promises were conditional and subject to be abrogated by the repeal of the statute. But this court, by holding that a purely statutory right of recovery may constitute a contractual obligation (Steamship Co. *vs.* Joliffe, *supra*) not subject to be defeated by a subsequent amendment or repeal of the statute, has in so doing held that a right of recovery given by a statute is not given subject to be divested at legislative will. If it were it could never constitute a "contractual" obligation, and more than any other promise given expressly subject to be recalled at will would constitute a contract. To say that its repeal cannot be given a retroactive effect *because* it is contractual is to dodge the question. Before the Federal Constitution can operate there must be a "contract," and before there can be a contract there must be a promise which does not contain within itself a power of revocation. In other words, the broadly stated general rule that purely statutory rights are subject to the further legislative will does not apply to substantive rights. If it did, a promise inhering in a statute or State charter would necessarily be given subject to such right of repeal and could never constitute a valid "contractual obligation," and a State could never make a statutory "contract" for the Federal Constitution to protect.

So far as we know, this court has never directly passed

upon the question as to whether a right of recovery not penal in its nature and given by a statute constitutes "property" within the meaning of the Fourteenth Amendment. But in the Joliffe case, *supra*, such a right is held to be a "vested right," which, of course, is property. While the case is not as clear on this particular point as we could wish, special attention being given to its contractual features (a branch of this case which we take up later), yet no reason is perceived why a contractual right of recovery should be any more "vested" than any other right, needing only the pronouncing of judgment to make it effective.

In Louisiana *vs.* Mayor of New Orleans, 109 U. S., 291, it appeared that a statute gave a right to a citizen for reimbursement for damages suffered by a mob. A citizen recovered judgment under this statute, but was prevented, at least temporarily, from collecting it by a subsequent statute limiting the right of the city to raise money by taxation. The court held that the judgment was not a contract, and that "conceding that the judgment, though founded upon claims to indemnity for unlawful acts of mobs or riotous assemblages, are property in the sense that they are capable of ownership and may have a pecuniary value, the relators cannot be said to be deprived of them so long as they continue an existing liability against the city." The limitation on the taxing power did not constitute a "deprivation" of such property. He still had his judgment, which he might collect in some other way.

While this is not perhaps a *direct* holding on the point, yet if the court had not believed that the right of recovery given by the statute was "property" it would almost certainly have so held and avoided the close reasoning necessary to justify its holding that the limitation of taxing power was not a "deprivation" thereof.

Mr. Justice Bradley, in a concurring opinion, held that the question of the recompensing of a citizen in such a case was purely a matter of legislative policy and that the right might

be taken away even after the injury occurred. Mr. Justice Harlan expressed the contrary view, as follows:

> "But if this view be erroneous, it seems quite clear that the State Constitution of 1879 cannot be applied to these judgments without bringing it into conflict with that provision of the Constitution, which declares that no State shall deprive any person of property without due process of law. That these judgments are property, within the meaning of the Constitution, cannot, it seems to me, be doubted. They are none the less property because the original cause of action did not arise out of contract, in the literal meaning of that word, but rests upon a statute making municipal corporations liable for property destroyed by a mob. If a judgment giving damages for such a tort is not a contract within the meaning of the Constitution, it is, nevertheless, property, of which the owner may not be deprived without due process of law."

The case now before the court is in every way stronger than the case then being considered. The case there was for damages wrought against the will of the city and by enemies of the city; here it is for damages wrought by the city itself and its agents. It is true, the claim now before the court was not reduced to judgment when the law was changed. but in so far as its being property was concerned, such fact is immaterial. It had a "pecuniary value" and was "capable of ownership," just as the judgment in the Louisiana case. Furthermore, being based upon an injury to property, it was both assignable and would survive the death of plaintiffs in error.

Jordan *vs.* Welch, 61 Wash., 569.

Long prior to the passage of the Fourteenth Amendment, Chancellor Kent used the following pertinent language with reference to retroactive law:

> "It cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed. A retroactive statute would partake

> in its character of the mischiefs of an *ex post facto* law, as to all cases of crimes and penalties; and in every other case relating to contracts or property, it would be against every sound principle. It would come within the reach of the doctrine, that a statute is not to have a retrospective effect; and which doctrine was very much discussed in the case of Dash *vs.* Van Kleeck, and shown to be founded not only in English law, but on the principles of general jurisprudence. A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void."
>
> Kent's Commentaries (4th ed.), pp. 455, 514, 515.

He based such declaration upon the general principles underlying all constitutional government. This court has held that it cannot declare a State statute unconstitutional because of such general principles unsupported by a specific constitutional inhibition. But in the Fourteenth Amendment there exists such a specific provision which we respectfully ask to have enforced.

The case of Dash *vs.* Van Kleeck, 7 Johns., 477; 5 Am. Dec., 291, is directly in point on this phase of the discussion.

The New York legislature had passed a law which, as interpreted by the court, gave a creditor the right to recover from a sheriff who had let a debtor prisoner escape, even though there was a recapture prior to the commencement of the action against the sheriff. This was an entirely new right of action given the creditor, in addition to those given at common law. There was not even an imposition of new duties on the sheriff, with a right of action for their breach. It was solely and purely a statutory right of action. An action having been started under this statute, the legislature passed a new law, directing that nothing in the original statute should be so construed as to prevent the officer from availing himself, "as at common law," of a defense arising from a recapture of the prisoner. The question presented

to the court was as to the effect of the new law on the action already commenced under the original statute. The decision of the majority of the court was to the effect that the new law should not be given a retroactive effect. And the reason for this holding was very plainly stated to be that the rights under the original statute had vested, when the escape occurred with the statute in force, and therefore could not and should not be disturbed.

Thompson, J., used the following language:

> "It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take by law the property of one individual, without his consent, and give it to another. The principle contended for on the part of the defendant inevitably leads to and sanctions such a doctrine. For if the plaintiff can be deprived of his remedy already vested, with equal propriety might he be compelled to refund the money, had he actually received it."

Further along he said:

> "Giving to the act now under consideration a retrospective operation would manifestly be productive of these consequences; *for it not only takes away a vested right, but publishes and endamages the plaintiff, in the payment of costs.* If his action is defeated and his right of recovery taken away by this statute, he not only loses his own costs, but will be obliged to pay costs to the defendant."

Chancellor Kent, then Chief Justice, exhaustively reviewed both the civil and the common law as to retrospective statutes, and shows them to be universally condemned. The Chief Justice said:

> "The very essence of a new law is a rule for future cases. The construction here contended for on the part of the defendant would make the statute operate unjustly. It would make it defeat a suit already commenced *upon a right already vested.* This would be punishing an innocent party with costs, as well as

> divesting him of a right previously acquired under the existing law. Nothing could be more alarming than such a subversion of principle."

The point we wish to emphasize is that both these eminent jurists unqualifiedly held that this purely *statutory right of action* constituted a *vested right.* At that time there was no constitutional prohibition as to the violation of such rights, and to avoid such an effect they were forced to interpret *the law* so as not to give it a retroactive effect. But the right to recover, though it was purely a right of recovery based on a statute which did not even create any new duty, was held to be a vested right, a right which is now unquestionably protected by the Fourteenth Amendment.

For a second reason, however, the argument of the State court is unsound. It assumes throughout that this action is one based on a statute which merely gives a right of action. We have already,at some length endeavored to show that this is not true, but that our cause of action arises from the establishment and completion of a grade by the city without complying with the conditions of recompense imposed by the statute, and necessary to render the action legal. Plaintiffs in error are in a better position than the judgment creditor in Louisiana *vs.* Mayor, *supra,* or the plaintiff in Dash *vs.* Van Kleeck. They were suing under statutes which merely said: "You shall have a right of recovery" in certain circumstances. We are suing under a statute which says to defendants, "If you damage plaintiffs' property by this grade, without making compensation, you are committing an illegal act, and of course, shall be answerable therefor."

The case of Graham *vs.* C. M. & St. P. Ry. Co. (Wis.), 10 N. W., 609, is very instructive as to the distinction between a statute which merely gives a right of action for a penalty and a statute which prescribes certain duties and allows a recovery for a violation thereof. It appears that there was in existence in Wisconsin a certain statute fixing the rate

which the railroad company might charge, and providing that in case the company charged more the shipper might recover three times the excess of the charges. While this law was in effect the railroad company violated it by charging plaintiff more than the sums permitted. Subsequently, and before action was brought, the whole statute was repealed. Plaintiffs brought action, suing for three times the excess as permitted under the statute. The lower court refused to permit such complaint to stand, whereupon they amended, asking only for the excess, and on trial judgment was rendered for the plaintiff for such excess, together with interest. The defendant strenuously insisted that the repeal of the statute did away entirely with any right of action to recover for the excess charges. The court, while admitting that the repeal of the statute did away with the right to recover the penalty, held further that such principle did not do away with the right to recover for damages suffered by reason of a breach of a statutory duty. The charging of excess rates was a violation of the statute, for which the plaintiff might recover, even after the repeal of the statute fixing the rate.

> "As we have shown above that an act which is void by reason of the laws existing at the time it is done is not made valid by a repeal of the law, the relations of the parties and their rights arising out of such unlawful acts must remain the same after the repeal as they were before, except only as to such inchoate rights of action as are expressly given by the statute. All other rights which result from the mere existence of the statute, and do not depend for their enforcement upon its provisions, are not affected by its repeal. To illustrate, the right to recover back money unlawfully demanded and received by the railway company for charges in excess of the legal and fixed rates after the repeal of the statute, does not depend so much upon the fact that the relation of debtor and creditor had become fixed between the parties during the existence of the law, as upon the other fact that the

company acquired possession of the plaintiff's money by an act which was unlawful. The *repeal of the law does not purge the act of its unlawful character, and as the relations of the parties remain the same after as before the repeal*—the company still retains possession of the plaintiff's money unlawfully."

"Suppose a railroad company should, in violation of the existing law, run at an unlawful speed through a city, or fail to ring the bell at a public crossing, and by reason of such unlawful running or neglect to ring the bell a citizen should be run over and seriously injured, would the repeal of these statutory provisions affect the injured party's right to recover for his injuries? We think under the decisions of this court, which hold that an act which is unlawful by statute when done cannot be made lawful by a subsequent repeal of such act, such repeal could not affect the party's right of action. *Notwithstanding the repeal, the fact would remain that the act which caused the injury was unlawful, and therefore a sufficient ground for the maintenance of the action.*"

The same rule is approved in Endlich on Interpretation of Statutes, section 481, where it is said:

"Rights that have become vested under a statute cannot ordinarily be divested by a repeal of it—*so it has been held that the repeal of a statute takes away no right of action for damages which has already accrued.* * * * Thus where an act which made it unlawful for a railway company to charge higher freight rates than those prescribed in the act was repealed it was held that a party who, during the time when the act was in force, was compelled to pay higher rates and did so under protest, was not deprived by the repeal of a right of recovery therefor."

The Supreme Court of Washington, itself, decided a somewhat similar case in Miller *vs.* Union Mill Co., 45 Wash., 199. In that case the factory act of 1903, which prevented the application of the doctrine of assumption of risk where the employer failed to guard his machinery as the statute required, was repealed, after an accident to a mill employee,

but before the trial. Defendants insisted that the repealed act, so far as it related to the case, merely gave a right of action, and that, therefore, its repeal before the trial took away such right of action and left the case as though the act had never been passed. The Washington court, however, clearly distinguished between such a case and the case then before it, pointing out that the past relation and rights of the parties, as fixed by the law, was a substantive right, which could not, therefore, be modified by the subsequent repeal of the law. In the court's opinion (p. 208), it was not possible that two employees should be injured in like manner on the same day, and one recover because he succeeded in getting his case tried before the repeal of the law, while the other failed because, through no fault of his own, his case could not be heard before the repeal became effective.

We do not know how to make our position on this branch of the case any clearer. Under the best of authorities and reason, even a right of action which exists solely because a statute declares it shall come into being on certain contingencies becomes, on the happening of such contingency, a vested right, and "property," which cannot be taken away without due process of law. But, when, as in the case at bar, the right of *action* exists, not merely because the statute declares it shall exist, but because the defendants have violated a statute to our damage, then such right of action is "property" and protected by the Fourteenth Amendment.

II. THE RIGHT OF ACTION BEING "PROPERTY," THE AMENDMENT OF 1909, AS GIVEN EFFECT BY THE WASHINGTON SUPREME COURT, DEPRIVES PLAINTIFFS IN ERROR THEREOF WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE FOURTEENTH AMENDMENT.

We do not see any necessity for arguing this statement. It is settled law, that action by the legislature is action by the State, and that an attempted wiping out of property rights by such statute, is a "deprivation without due process of law."

III. PLAINTIFFS IN ERROR HAVE A CONTRACTUAL RIGHT TO COMPENSATION GROWING OUT OF THE FACT THAT THE ORIGINAL STATUTE WAS IN FORCE AT THE TIME OF THE AUTHORIZATION AND COMPLETION OF THE GRADE.

It is elementary that where a thing can legally be done only on performance of certain conditions, and the thing is done, the law will imply a promise to fulfill the condition, though none is explicitly given. Thus if A receives B's money, to the possession of which he is lawfully entitled only if he intends to afterwards account therefor to B, the law will imply a promise on his part to render such account. And particularly would this be true where the thing done is beneficial to the person acting and the condition to be fulfilled is payment of compensation to the one injured. So if A continues in possession of B's premises after the expiration of a lease the law will not treat him as an absolute trespasser, but will imply a promise on his part to pay rent so long as he continues in possession.

Our whole system of law and our written Constitution are so zealous in guarding property rights from legislative interference that examples are necessarily rare in which legislative authority to damage or use property is given to one person on condition of making recompense to the person injured. Eminent-domain proceedings are almost the only instance. And these proceedings, and the rights of the property owners thereunder, are protected by special constitutional provisions, so that the necessity of invoking the implied promise and showing that it constitutes a contract within the protection of the Federal Constitution can rarely arise. But this is a case in which the damage originally suffered has been held by the State court to not be within the State constitutional prohibition against damaging without compensation, and where therefore we are thrown back on the Federal Constitution. And there is the best of precedent, as well as reason, for holding that where such authority to

damage on making compensation is given by statute, and the damage is done, or even where compensation is required by statute for a benefit unaccompanied by damages to the person to be recompensed, the implied promise inherent in the statute may be successfully invoked. And this principle of contractual obligation must apply, of course, whether the particular damage for which the contract of recompense is made falls within the eminent-domain clause of the State constitution or not.

On reason the matter seems very plain. We are aware of the rule that the word "contract" in the Federal Constitution does not include claims for a pure tort, even though reduced to a judgment. But this is by no means a case of a pure tort. The city *did* have authority to damage the property as it did if it had only made compensation, even after the work was done. When it did the damage it entered into an implied "compact" with the owners that it would pay for such damage.

Healy *vs.* City of New Haven, 49 Conn., 394, emphasizes this particular point of the contractual obligation. In that case it appeared that there was in effect at the time the grading was ordered and established a law authorizing recovery by the abutting property owners. Subsequently, and prior to the actual digging of the grade, the law authorizing recovery was repealed. The question was raised as to whether this repeal deprived the property owner of the right to recover. As to this the court said:

> "We think the law is so that the statute as it existed when the improvement was undertaken or entered upon must determine the rights of the parties. *The presumption is that it was undertaken in view of the statute, the parties respectively accepting the privileges which it conferred and the liabilities which it imposed.* A contrary rule might operate as a trap."

The case at bar is much stronger than the Healy case, for in this case not only was the work ordered by the City En-

ever while the law unquestionably gave a right to compensation, but the work was actually done while the law was in such condition. To hold that the change of the law affected the plaintiff's rights would be, indeed, as the Connecticut court said, to make it operate as a trap and to violate the implied contract under which it was performed.

And the contractual obligation arising from such an implied contract is protected by the Federal Constitution.

Steamship Co. *vs.* Joliffe, 2 Wall., 450; 17 Law Ed., 805, involved this point. California had passed a statute requiring the payment of half pilotage fees to any pilot who hailed a vessel in San Francisco harbor and whose services were declined. Pending an action by a pilot, based on this law, the statute was repealed, and the same claim was made there that is made here that, the action being statutory, it fell with the repeal of the statute. As to such contention this court said:

> "If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. *The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention, which is an essential ingredient of an actual contract, is often wanting.* Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract." * * *

> "When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

And distinction which can be drawn between that case and the case at bar is in favor of the present case; for if the obligation of an implied statutory contract, forced by the statute upon one who receives no actual benefit from it, will be protected by the Federal Constitution and become a vested right, how much more will the implied obligation of a statutory contract, voluntarily assumed, be protected for the benefit of the owner whose property, without his consent, has been actually damaged thereunder. The Healy case shows that there *was* an implied contract. The Joliffe case shows that such a contract is within the *protection* of the Federal Constitution. And both cases are founded on sound reason.

We respectfully submit, therefore, that the repeal of the law of 1907 could not affect the right of recovery in this action as to give the law an effect which not only deprives plaintiffs in error of their property and vested rights, but also violates the obligation of the contract entered into when the work was ordered and the damage actually done by the city and its agent in the construction of the grade.

IV. THE REPEAL OF LAWS OF WASHINGTON, 1907, CHAPTER 153, SECTION 48, NOT BEING SUFFICIENT UNDER THE FEDERAL CONSTITUTION TO DIVEST THE RIGHT OF RECOVERY, THIS CASE MUST BE REVERSED.

This case differs from its companion case of Ettor *vs.* City of Tacoma *et al.*, now before this court on writ of error, in that the property and street here in question were a part of the city of Tacoma long before the County Board passed its order vacating "M" and "N" streets on the con-

dition that the railway company should grade 26th street. Therefore, its order, though in terms including the grading of the portion of the street here in question, had no more effect thereon than so much waste paper. Therefore we need not here repeat the argument of the Ettor case on this point. And the record showing no other possible ground on which the demurrer could have been sustained, if the law of 1907 had been applied, a holding by this court that the repeal of the law of 1907 cannot operate retrospectively necessitates a reversal of the case.

V. THE STATUTE OF 1907 BEING APPLICABLE, BOTH OF THE DEFENDANTS IN ERROR ARE RESPONSIBLE TO PLAINTIFFS IN ERROR FOR THE DAMAGE SUFFERED.

The holding of the State court, affirming the judgment as to the railway company, necessarily involves a holding that its act in grading the street was authorized, either by the city or by the prior action of the board. If it was not authorized at all, the court would have necessarily found the railway company liable for the unauthorized damage which it wrought. We have already discussed the theory that the action was authorized by the prior action of the board, and found it to be ill founded. It must, therefore, be conceded that the acts of the railway company were authorized by the city. It follows that the grading was the act of the city, by its agent, the railway company, and that the city is liable if, as we have shown to be the fact, the act of 1907 applied.

Is the railway company also responsible under such circumstances? We contend that it is, and for two reasons:

First. The act authorized by the city was, itself, in view of the refusal to carry out the provisons of the act of 1907. an illegal act, for which the agent as well as the principal is liable. The cases where contractors, as the railway company is here, have by direction or authority of the city done illegal acts in the streets are generally against the city alone.

But in reason, it would seem, that the contractor should also be liable. The fact that one has been ordered to do a wrong, or has contracted to do it, does not excuse the wrong.

Hatch *vs.* Olympia, etc., Ry. Co., 6 Wash., 7, is directly in point. In that case the statute provided that the city might authorize the laying of railway tracks in a city, but no railroad track should be there laid until the injury was compensated and paid for. The court held that even though an ordinance was passed authorizing such use of the streets, still the railway company would be liable. In its discussion the court used the following language:

> "The city, under its charter, had not itself the right to change the grade of streets without paying the damages resulting therefrom to owners of abutting property who had made improvements thereon with reference to the established grade, and therefore could not legally authorize the railroad company to do so."

Second. While the prior action of the board did not authorize the grading and damage without subsequent action by the city, yet the record shows that the city, in making the railway company its agent for the construction of the grade and in vacating the streets referred to in the order, adopted as its own the original proceedings, except as necessarily modified by the laws and statutes governing the grading of streets by cities of its class. When the city, by its engineer, ordered the work to be done in a certain manner and vacated "M" and "N" streets, and the railway company accepted such vacation and built the grade as directed by the city, they impliedly agreed that their rights and liabilities the one to the other should be as set out in the order of the board. One of these provisions was that the grading of the street should be at the railway company's "own expense, and without cost or charges to or upon the said county of Pierce." Under the statute governing the city, which by the mutual acceptance of the parties succeeded in the con-

tract to the county of Pierce, a part of this expense so contracted to be paid was payment of compensation to the property owners. The railway company has, therefore, by proceeding as though the original order of vacation were a contract between itself and the city, agreed to pay plaintiffs in error for the injury which they would sustain. The promise was obviously not only for the benefit of the city, but for the benefit of the property owners, and they may rely upon it in an action to recover such damages. This is not only the universal rule in the United States, but is made positive by the provisions of the Washington Code, that "Every action shall be prosecuted in the name of the real party in interest," except as otherwise specially provided.

Remington & Ballinger's Code of Washington, sec. 179.

Conclusion.

It therefore appears that the repeal of the act of 1907 could not affect the right of recovery in this action; that under such act the right of recovery existed, and that each of the defendants in error is liable in this action for such recovery. We therefore respectfully ask that the judgment of the State Supreme Court be reversed, and that the case be remanded for further proceedings in accordance with the law.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1912

EDWIN HOWARD, EMMA HOWARD,
Plaintiffs in Error,

vs.

CITY OF TACOMA *et al.*,
Defendants in Error.

No. 69.

BRIEF FOR DEFENDANTS IN ERROR

STATEMENT OF FACTS.

There is but one question to be presented for the consideration of this Court, viz.:

DID THE SUPREME COURT OF WASHINGTON ERR IN HOLDING THAT NO SUBSTAN-

TIAL RIGHT OF PLAINTIFFS IN ERROR, UNDER THE CONSTITUTION OF THE UNITED STATES, HAD BEEN VIOLATED BY THE ACT OF THE LEGISLATURE OF THAT STATE IN 1909 (Laws of 1909, p. 151, Rem. & Bal. Code, Sec. 7815), amending Section 48, of Chapter 153, of the Laws of 1907?

The State of Washington, through the decision of its court of last resort, adheres to the doctrine that the dedication of land to public use for a street, as by a plat, constitutes an agreement on the part of the dedicator that the public may thereafter do what is necessary in the way of grading or filling to make a passable street, without liability to abutting land owners for consequential damages.

Fletcher v. Seattle, 43 Wash. 627;

Ettor v. Tacoma, 57 Wash. 50.

In taking that position it followed the principles announced by this Court in

Smith v. Corporation of Washington, 20 Howard 135;

Sauer v. New York, 206 U. S. 536.

So deciding, the Washington court in this case held that because there had been no right of action until the statute created it, the repeal of the creative statute defeated the pending action.

Plaintiff in error, admitting that his right of action was founded upon the statute alone, disputes

that position, and claims that his right of action could not be taken away once it had accrued.

Jefferson Branch Bank v. Skelly, 66 U. S. 431, cited by plaintiffs, could only become applicable when it should be held that the 47th section of the Act of 1893 made a contract between the state of Washington and all land holders and lot owners (which should be irrevocable) that no street grade could be made in front of their property without the payment of consequential damages.

The same remarks apply to *Bridge Proprs. v. Hoboken S. & I. Co.*, 68 U. S. 116; *Chicago B. & Q. R. Co. v. Nebraska*, 170 U. S. 57, and *Douglas v. Kentucky*, 168 U. S. 488.

But plaintiff does not attempt to claim or show that the statute made a contract between the state and the land or lot owner; his point III. merely endeavors to argue that because of the statute the City's liability for damages carried with it a contractual obligation that it would pay damages, if any, whenever it graded a street; which is a very different proposition.

It cannot be successfully contended that the liability of the City while the statute existed was in any sense contractual.

It is for defendants in error to support the decision of the court below, and inasmuch as the two opinions of the Supreme Court of Washington so

completely and effectually cover every proposition at issue here, this brief will be found to be a close imitation of those opinions, with only such verbal departures as the circumstances make necessary.

The right claimed to have been taken away was wholly statutory.

But the repeal of a statute creating a right of action, without a saving clause, takes away all right to proceed, and the repealed act is considered as if it had never existed except for the purpose of those actions or suits which have been prosecuted and concluded while it was an existing law. This is axiomatic, so that it is held that a repeal after decision, but before entry of judgment, works a discontinuance of the suit, and that a repeal pending an appeal to a higher court charges the appellate court with the duty of declaring the litigation ended without right of further prosecution.

"This rule holds true until the proceedings have reached a final judgment in the court of last resort, for that court, when it comes to pronounce its decision, conforms it to the law then existing, and may, therefore, reverse a judgment which was correct when pronounced in the subordinate tribunal from whence the appeal was taken, if it appears that pending the appeal a statute which was necessary to support the judgment of the lower court has been withdrawn by absolute repeal."

Vance v. Rankin, 194 Ill. 625.

"It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the re-

peal finds them. If final relief has not been granted before the repeal went into effect, it cannot be after."

South Carolina v. Gaillaud, 101 U. S. 433.

See in support of this rule:

Cooley, Const. Lim (7 Ed.) 544;

2 Sutherland Stat. Const. (2 Ed.) 285;

Endlich, Interp. of Stat., Par. 478, 479, 480;

22 Am. & Eng. Ency. of Law, 745, 752;

Hampton v. Commonwealth, 19 Pa. St. 329;

Sumner v. Cummings, 23 Vt. 427;

Taylor v. Strayer, 78 N. E. (Ind.) 236;

Andig v. Levi, 57 Miss. 58;

Riley v. City, 92 N. W. (Ia.) 887;

Century Digest Title "Statutes," Vol. 44, Col. 2975;

Cope v. Hampton County, 19 S. E. 1018.

Plaintiffs' citation of *Muhlker v. Railroad Co.*, 197 U. S. 544; *Steamship Co. v. Joliffe*, 2 Wall 450, and *Sauer v. New York*, 206 U. S. 536, is not persuasive. To make them of any force it must be assumed that the action for damages would have lain although there had never been a statute giving compensation for consequential injury resulting from an original grade, and that Chapter 80 of the Laws of Washington of 1909 was void if it could be given a retrospective effect.

The Muhlker case grew out of a condition theretofore unknown to the courts of this country. It had been held by the Supreme Court of New York

that light and air coming from a street could not be taken from the adjacent property owner without compensation by an elevated railroad company. Subsequently one Muhlker acquired certain property fronting on a street over which the track of the railway was constructed. It was laid on or below the grade of the street, but by an act of the legislature the company was authorized to change it to an elevated road. The company claimed immunity from damages under its original grant of a right of way and the subsequent act of the legislature. The state court held with the company. That judgment was reversed by this Court.

Cases which will perhaps be cited by plaintiffs are the following, which will not, however, support its appeal to this Court:

A common law right of action which has become vested is, of course, not affected by legislative action, especially where the foundation of the right is a fraud or fraudulent practice, as in *Angle v. Chicago & Co.*, 151 U. S. 65. It was not even claimed in that case that the action of the legislature had affected Angle's right of action.

In *Westerfelt v. Gregg*, 12 N. Y. 211, the husband's rights did not depend upon any statute, but upon the laws governing the rights of married persons as administered by the courts of New York.

In *Stevens v. Marshall*, 3 Pinney (Wis.) 203, the mill owner could not, at common law, flood the lands

of the other proprietor without being liable for damages, and to an injunction as well. He was bound to pay damages in either case, but, under the statute, he had practically the right of eminent domain; that is, he could, by paying enough damages, have the perpetual right of flowage.

Nor does the *City of Elgin v. Eaton*, 83 Ill. 535, furnish anything better, for the City had taken Eaton's land by entering upon it, and it was proposing to keep the land without paying for it, which it could not do without either statute or constitutional provisions.

In *Graham v. C., M. & St. P. Ry. Co.*, 10 N. W. 609 (Wis.), the court said:

"This court has held that a right of action, whether civil, penal or criminal, expressly given by statute, is destroyed by its repeal, unless there be a saving clause in the repealing statute which preserves the right to the plaintiff. The repeal destroys all such rights of action, whether commenced and pending at the time for repeal or not"—citing fourteen cases from Wisconsin reports.

The statute in that case prohibited a charge from Muscoda to Milwaukee of more than 19 cents per 100 pounds on grain, and allowed a recovery of three times any excess charged. The company charged 25 cents, and the suit was commenced to recover three times the 6 cents excess. The legislature repealed the triple damage provision, but the rate limit stood, and a recovery for 6 cents was sustained be-

cause of the wrong which had been done by exacting an unlawful rate.

In none of these cases was the right of a city to make an original grade of its streets involved, nor was the right of the legislature to abridge or abrogate a right given by statute considered or questioned.

In *Steamship Co. v. Joliffe* a claim arose under the pilotage law of California. After a right of action had accrued, the statute upon which it was founded was repealed. The court said:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

This is the undoubted rule as between individuals when rights have accrued under contract or quasi contract, but it has never been extended so as to preserve a right of action against the public when the right is not based upon contract, but is asserted because it accrued at a time when the right of sovereignty was temporarily surrendered. A case involving the same principle was before the Supreme Court of Oregon.

Ladd v. City of Portland, 32 Ore. 271.

Under an original charter a city was authorized to improve streets at the expense of abutting property owners, but it was provided that when a street

"has become improved under and by virtue of the provisions of this chapter, thereafter such street or part thereof shall not be subject to be again improved, but may be repaired." Thereafter the city was consolidated with others, and a new charter was passed, "all vested rights being reserved." Thereafter the council proceeded to, and did, improve the street and assessed the cost to the abutting property. An action was brought to restrain the collection of the tax, the contract clause of the federal constitution being invoked. The court held:

"The Supreme Court of the United States, in interpreting the clause of the constitution now under consideration, has always taken the terms thereof in their ordinary meaning, and holds that the word 'contract,' as used therein, means a voluntary agreement of minds upon a certain consideration, to do or not to do certain things: *Murray v. Charleston*, 96 U. S. 432; *Louisiana v. Mayor etc. of New Orleans*, 109 U. S. 285 (3 Sup. Ct. 211); *Fisk v. Jefferson Police Jury*, 116 U. S. 131 (6 Sup. Ct. 329). And in our opinion the legislation in question has none of the essential ingredients of such a contract. The power to assess the costs of the improvement of a street upon abutting property is embraced within the sovereign power of taxation primarily in the legislature, but which it may constitutionally delegate to local municipal governments, with or without restraints or limitations; but it is 'never presumed to be relinquished unless the intention to relinquish is declared in clear and unequivocal terms': *Philadelphia Railroad Company v. Maryland*, 51 U. S. (10 How. 394). And even then, if the exemption is not supported by some consideration it may be revoked at any time: *Rector etc. of Christ Church v. County of Philadelphia*, 65 U. S. (24 How.) 300. * * * The manifest purpose of the provision of the charter

under consideration was to define the mode and extent of the power of the council in the matter of street improvements, and the limitation on the exercise of such power was a mere concession to the citizen, and an act of grace, and not a contract by which the state forever relinquishes the sovereign power of taxation. It was a limitation voluntarily imposed by the legislature upon the powers of the city, which that department of the state government could remove at any time public policy or the interests of the municipality might seem to demand, and bound the state only so long as the statute remained unrepealed."

The sum of the matter is this:

This Court held in *Smith v. Washington, supra,* that no action would lie for consequential damage to abutting land caused by the grading of a street in front of it.

The constitution of Washington, Article I., Section 16, prohibits the taking or damaging of property without compensation.

The Supreme Court of Washington declared that when land was dedicated for a street there was an implied contract that the street might be graded either up or down, as the nature of the surface required; and that such a grade was not a "damaging" of abutting property within the meaning of the constitution. The legislature, by a most palpable mistake, hidden away in a long act upon the subject of eminent domain by cities, nevertheless conferred a right of action for such damages.

With the exception of the Fletcher case (43 Wash.

627), these are the only cases which have arisen in the state under the statute. The Fletcher case was a discovery not made until a petition for rehearing was filed. As soon as the attention of the legislature was called to the evident blunder its predecessor had made, it repealed the statute, with an emergency clause putting the repeal in effect at once.

Under all authority and upon the best reason it is submitted that the case should be affirmed.

Respectfully,

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